Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

MARSHA SEIBER and ALVIN SEIBER,
Petitioners,

v.

STATE OF OREGON, by and through the
OREGON STATE BOARD OF FORESTRY,
Respondents,

and

AUDUBON SOCIETY OF PORTLAND,
OREGON TROUT, INC., PACIFIC
COAST FEDERATION OF FISHERIES, and
INSTITUTE FOR FISHERIES RESOURCES,
Intervenors-below.

Petition for a Writ of Certiorari to the Oregon Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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August 30, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

127 pp

QUESTION PRESENTED

Whether Petitioners state a claim for a physical taking of their property in violation of the Just Compensation Clause of the Fifth Amendment to the U.S. Constitution, because an administrative order enforcing a state regulation prohibited them from harvesting 40 acres of merchantable timber on their 200-acre tree farm or from engaging in any activities that might cause "owls to flush from the nesting site" in order to protect the subject timber as a public resource for spotted owl nesting habitat?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are Petitioners Marsha and Alvin Seiber and the Respondent State of Oregon. An original plaintiff, the Oregon Small Woodlands Association, was dismissed for lack of standing by the trial court and did not appeal that decision. The Oregon appellate courts designated a number of entities as "Intervenors-below." These organizations (Audubon Society of Portland, Oregon Trout, Inc., Pacific Coast Federation of Fisheries, and Institute for Fisheries Resources) actually filed briefs as amici.

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Petition for a Writ of Certiorari
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PETITION FOR A WRIT OF CERTIORARI

Petitioners Marsha and Alvin Seiber respectfully petition for a writ of certiorari to review a judgment of the circuit court of the State of Oregon for Linn County dismissing their physical takings claim based upon the Fifth Amendment to the U.S. Constitution, with prejudice, which judgment was affirmed by the Oregon Court of Appeals, without a written opinion, and then a petition for review by the Oregon Supreme Court was denied, again without a written opinion.

OPINIONS BELOW

The appellate judgment, entered on July 24, 2002, is reproduced as Appendix A ("App. A"). The Oregon Supreme Court's order of June 4, 2002 denying review is reproduced as Appendix B ("App. B"). The Oregon Court of Appeals' order of December 5, 2001, affirming the judgment of the trial court is reproduced as Appendix C ("App. C"). The trial court's judgment entered December 8, 1999 granting the state summary judgment on Petitioners' physical takings claim with prejudice is reproduced as Appendix D ("App. D"). The trial court's order entered December 10, 1999 granting the State of Oregon summary judgment on Petitioners' physical takings claim is reproduced as Appendix E ("App. E"). The trial court's letter opinion of November 10, 1999, dismissing Petitioners' physical takings claim based on the Fifth Amendment is reproduced as Appendix F ("App. F").

STATEMENT OF JURISDICTION

The Oregon Supreme Court denied Petitioners' petition for review on June 4, 2002. (*See* App. B.) The appellate judgment, was entered on July 24, 2002. (*See* App. A). This Petition is being timely filed within 90 days of that judgment. 28 U.S.C.A. § 2101(c) (West 1994). The Court has jurisdiction pursuant to 28 U.S.C.A. § 1257(a) (West 1993).

In dismissing Petitioners' physical takings claim based upon the Just Compensation Clause of the Fifth Amendment, the trial court relied on an opinion by the Oregon Court of Appeals in the earlier case of *Boise Cascade Corporation v. Oregon State Board of Forestry*, 991 P.2d 563 (Or. App. Ct. 1999), *rev. denied*, 18 P.3d 1099 (Or. 2000), *cert. denied* 532 U.S. 923 (2001) (hereinafter "*Boise Cascade*".) In *Boise Cascade*, the court held that a landowner cannot state a claim for a physical taking of property based upon the same administrative rule at issue in this Petition, because "[t]he state has no control over where spotted owls choose to nest,"

even though the State, through its State Forester, had designated the nesting site as a protected public resource for spotted owl nesting habitat. 991 P.2d at 570.

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provision at issue in this case is the Takings or Just Compensation Clause of the Fifth Amendment, which provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Takings Clause is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

Petitioners were prohibited from harvesting timber on their property based upon Oregon Administrative Rule 629-665-0210 (2002), formerly numbered 629-024-0809, the pertinent parts of which provide:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> (a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
>
> (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. . . .

> (2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. . . .
>
> . . . . .
>
> (5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

This Rule is reproduced in its entirety as Appendix G ("App. G"). Also involved are Oregon Administrative Rules 629-680-0000 (2002), formerly 629-056-0010; 629-680-0010(5) (2002), formerly 629-056-0020(5); 629-680-0100(1) (2002), formerly 629-056-0100(1); and 629-680-0220 (2002), formerly 629-056-0220, which declare, define and together provide for the protection of such sites as public resources. Each of these rules is reproduced in Appendices H through K, respectively ("App. H," "App. I," "App. J," "App. K").

The U.S. Fish and Wildlife Service (the "FWS") is authorized to issue an incidental take permit ("ITP") for the "taking" of a threatened species under section 10 of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C.A. § 1531, *et seq* (West 2000 & Supp. 2002). *See* 16 U.S.C.A. § 1539 (West 2000).

STATEMENT OF THE CASE

A. Facts Material to the Question Presented.

1. *The Seibers Own and Manage a Family Tree Farm.*

Petitioner Marsha Seiber is a homemaker and manages the family's 200-acre tree farm that she inherited from her uncle in 1986. Her husband, Petitioner Alvin Seiber, is a retired postal worker. By deed, Mrs. Seiber gave her husband a joint interest in the property as tenants by the entirety. Their farm is located in Linn County, Oregon, in the foothills of the Cascade mountain range. The farm consists of between 185-190 acres planted with conifer tree species, as required by Oregon law,[1] that are managed for harvesting on an approximately 60-year rotation. The remainder of the property contains the Seibers' residence and a pasture. (*See* Second Amended Complaint, filed August 20, 1998 with the trial court, reproduced as Appendix L ("App. L") ¶ 1; 31a.)[2]

2. *The Administrative Record: The State Prevented the Seibers from Harvesting Their Timber Through Enforcement of State Regulations.*

In June 1990, the FWS indicated it intended to list the northern spotted owl as a threatened species under the ESA. On July 23, 1990, that listing took effect. Endangered & Threatened Wildlife & Plants, 55 Fed. Reg. 26,114 (June 26, 1990). At the same time, the FWS issued Procedures Leading

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[1] Use of the Seibers' land is governed by Oregon state-wide land use regulation contained in Or. Admin. Rule 660-015-0000(4) (West 2002), pertaining to forest lands. *See also* Or. Rev. Stat. §§ 527.620(6), 527.630(1) (2001).

[2] The State's Answer to Second Amended Complaint with Affirmative Defenses and Counterclaim, filed September 2, 1998 with the trial court is reproduced as Appendix M. It either admits or does not contest the facts material to this Petition.

to Endangered Species Act Compliance for the Northern Spotted Owl ("Guidelines"), requiring the preservation of 70 acres of timber around northern spotted owl nest sites.

Based upon the FWS Guidelines, the Oregon Board of Forestry (the "OBF") adopted a regulation, Oregon Administrative Rule 629-665-0210 (2002) (*see* App. G), requiring private landowners to also protect a 70-acre area around a nest site or activity center to be "occupied by an adult pair of spotted owls, capable of breeding." Or. Admin. R. 629-665-0210(1)(a), (2) (2002). Another subsection of the same rule prohibits the landowners from engaging in any activities which may cause the "owls to flush from the nesting site." Or. Admin. R. 629-665-0210(1)(b) (2002). Other regulations declare that "sensitive bird nesting" and threatened and endangered wildlife species sites on private forest lands are public "resources," and require state protection thereof. *See* Or. Admin. R. 629-665-0000, 629-665-0010 (2002).

In 1994, Petitioners submitted a written plan to the Oregon State Forester ("OSF") to harvest some of the timber on their property. (App. L at ¶ 4; 32a.) At that time the OSF designated approximately 40 acres of Petitioners' timber (along with approximately 30 acres of an adjoining landowner's timber) as a spotted owl nesting site pursuant to Or. Admin. R. 629-665-0210(1)(a). (App. L at ¶ 4; 32a.)

On February 4, 1998, Petitioners submitted a second written plan to the OSF giving notice that they desired to harvest the timber within the 40 acres that the OSF had previously designated as a protected public resource for a spotted owl nesting site. (App. L at ¶ 15; 35a.) In seeking to harvest the subject timber, Petitioners indicated they were willing to not conduct logging operations while spotted owls might be nesting in the area (March 1 through September 30), or until the young spotted owl had fledged, to avoid any incidental harm. Their written plan to harvest the subject timber was denied on February 19, 1998, on the ground that it

failed to describe how the operation would be conducted to provide a 70-acre core area of suitable spotted owl habitat consistent with the requirements of Or. Admin. R. 629-665-0210(1)(a). (App. L at ¶ 15; 35a.)

Petitioners then appealed the OSF's denial of that written plan to the OBF, which on March 27, 1998 entered a final order, reproduced as Appendix R, affirming the denial of their right to harvest the subject timber. (*See also* App. L at ¶ 16; 36a.) The denial by the OBF was a final administrative action prohibiting Petitioners from harvesting the 40 acres of their timber the State had designated as protected spotted owl nesting habitat.

3. *The State Appellate Court of Last Resort Denied Petitioners Relief in Litigation Below.*

Petitioners commenced this inverse condemnation action in the Circuit Court for the State of Oregon for Linn County on August 20, 1998, alleging a taking of their timber under the Just Compensation Clause of the Fifth Amendment and a similar provision contained in the Oregon Constitution. Petitioners alleged both a physical taking and a regulatory taking in separate Counts. On December 10, 1999, the circuit court entered an order dismissing with prejudice Petitioners' federal constitutional claim for a physical taking that is the subject of this petition. (App. E.) The circuit court also dismissed without prejudice Petitioners' federal and state regulatory taking claims, on the basis they were not ripe because Petitioners had not applied for an ITP for the owls on their property from the FWS.[3] If an ITP were granted by the

[3] Trying to "ripen" a regulatory taking claim by going through the ITP process is an almost impossible task for a small landowner. *See* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan. L. Rev. 305, 326 (1997) ("The ESA imposes no time limits on the FWS's consideration of applications for Incidental Take Permits, and landowners and the FWS often go through multiple iterations of potential mitigation measures. The FWS, moreover, frequently finds it

FWS, that would give the OBF discretion to allow harvesting of the subject timber under Or. Admin. R. 629-665-0210(5).

Petitioners then filed a timely appeal of the circuit court's ruling. On December 5, 2001, the Oregon Court of Appeals affirmed the trial court (App. C), and on June 4, 2002, the Oregon Supreme Court denied review (App. B).

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10(b) lists among the considerations governing review on certiorari the circumstance in which a state court of last resort has decided a federal question in a way that conflicts with the decision of a federal court of appeals. In this case the decision was rendered by a lower appellate court and the state court of last resort refused to grant review. (Apps. C & B.) Under Supreme Court Rule

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politically safest to put off reaching a definitive decision on a proposed HCP. . . . Property owners repeatedly voice dismay over their almost Kafkaesque inability to reach closure under the ESA." (footnote omitted)); Alan M. Glen & Craig M. Douglas, *Taking Species: Difficult Questions of Proximity and Degree*, 16 Nat. Resources & Env't, 65, 131-33 (2001) ("[A]nyone who expects FWS to evaluate their incidental take permit applications based on the legal standard for harm has got another thing coming. . . . FWS typically gauges the potential effects of a project based on a conservation biologist's view of harm that barely resembles the rule adopted by FWS in 1981 and sustained by *[Babbitt v.] Sweet Home* [515 US 687 (1995)]. In the world of the FWS biologist, habitat modification alone still equals take. From the agency's standpoint, evaluating projects with a broad, view of harm enables FWS to demand more mitigation from permit applicants than it would be able to justify under the narrow view of harm. Given the scarcity of public funds for habitat acquisition programs, extracting mitigation through the ESA permitting process has become an alternate means for FWS to pursue its conservation goals."); Daniel A. Hall, *Using Habitat Conservation Plans to Implement the Endangered Species Act in Pacific Coast Forests: Common Problems and Promising Precedents*, 27 Envtl. L. 803, 805 (1997) (The FWS also requires that landowners not only protect habitat for the subject species of the ITP, but for "all species which might ever reside on the property.").

10(c), a ground for review exists when a state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. All of these grounds for review are present in this case.

I. THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT.

The precedent established below is the latest in a growing number of cases arising out of government regulations that require property owners to leave their land in its natural condition so that it can be occupied as wildlife habitat and, at the same time, deny the property owner compensation for the imposition of a wildlife servitude. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (involving navigational servitude). These are the same type of wildlife servitudes that the federal government regularly acquires by eminent domain. *See North Dakota v. United States*, 460 U.S. 300 (1983). Oregon law does not authorize the state to use its power of eminent domain for that purpose. Or. Rev. Stat. §§ 271.715(1), 271.725(1) (2001).

A. Under A Physical Taking Theory The Test Is Whether The Landowner Has The Right To Exclude Wildlife, Not Whether The State Has Control Over It.

This Court in *Tahoe-Sierra Preservation v. Tahoe Regional Planning*, 122 S. Ct. 1465 (2002), clearly stated the difference between a physical taking and a regulatory taking. A physical taking (1) involves the government's use of the property for a public purpose (2) and denies landowners the right to exclude others from their property. *Id.* at 1479 n.19.

"A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others." *Id.*

In this case, the government, by its regulation, has both claimed the right to use Petitioners' property for spotted owl nesting habitat and prevented Petitioners from taking any action to exclude the owls, either by harvesting their habitat or causing them to "flush from the nesting site." *See* Or. Admin. R. 629-665-0210(1)(b) (App. G).

The trial court below dismissed Petitioners' physical takings claim based upon a 1999 opinion by the Oregon Court of Appeals, in *Boise Cascade*, that involved the same spotted owl regulation. 991 P.2d at 564 n.1. In *Boise Cascade* the court held the landowner could not state a claim for a physical taking because "[t]he state has no control over where spotted owls choose to nest." *Id.* at 570. Thus, in *Boise Cascade*, the Oregon appellate court shifted the focus of this Court's physical taking jurisprudence from the issue of whether there had been a forced occupation authorized by government to whether government had control over the occupant, which this Court has never deemed to be the determining factor. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 n.9 (1982); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 (1992). In a physical taking case, the key issue is whether the landowner has the right to exclude the government-authorized occupant and has been forced to acquiesce to the occupation. *Yee*, 503 U.S. at 527; *Kaiser Aetna*, 444 U.S. at 176. Due to the ESA and state regulations that impose similar wildlife servitudes, there are a growing number of cases arising out of government requiring private landowners to subordinate the use of their property to a dominant use of it by the government to protect wildlife. In addition to the Oregon courts, courts in other jurisdictions have also refused to find a taking and award compensation. *Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988) (gov-

ernment does not "control the conduct" of wildlife species) *cert. denied*, 490 U.S. 1114 (1989) (see dissenting opinion of Justice White); *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761, 764 (Fla. Dist. Ct. App.) (landowner can use its property "in any way that would not disturb the eagles' natural habitat"),[4] *rev. denied*, 645 So. 2d 452 (Fla. 1994). Relying in part on *Christy*, in *Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal. Rptr. 2d 338, 345 (Cal. Ct. App. 1993), a California Court of Appeal rejected a physical takings claim involving the spotted owl and other wildlife species whose habitat was protected by state law. Although the California Supreme Court affirmed the lower court, 876 P.2d 505 (Cal. 1994), it omitted any discussion of the takings issue and took the extraordinary step of directing that the lower court's opinion not be published in the official reports. 26 Cal .Rptr. 2d. 338, fn.*; No. S037820, 1994 Cal. LEXIS 1388 (Cal. Mar. 18, 1994). Like the Oregon appellate courts in this case, it apparently wanted to avoid having to deal in a written opinion with a physical taking claim involving the protection of wildlife habitat.

Here, the subject regulation goes beyond merely regulating the use of Petitioner's land; it requires that the timber on it be left standing for the sole purpose of providing spotted owl habitat. Clearly it is a use of private property by the government for a public purpose. *Yee*, 503 U.S. at 522-23. Further, the regulation prohibits Petitioners from conducting any activity on their property that could "cause [the] owls to flush from the nesting site." Or. Admin. R. 629-665-0210(1)(b). And most importantly, Petitioners cannot harvest 40 acres of trees that have taken them decades to grow and on which they depend for income during their retirement years.

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[4] *See* William K. Jones, Charles Evans Hughes Professor of Law at Columbia University, criticism of the *Flotilla* decision and describing it as a "classical" example of a physical taking. *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 61-62 (1995).

Petitioners have no choice under the subject regulation but to acquiesce to the occupation of their timber as a nesting site. *Yee*, 503 U.S. at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." (emphasis in original)).

In *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 94 (2d Cir. 1992), the Second Circuit held that there had been no taking because the landowner could exclude from its property deer that the state sought to protect and also could log "the entire 44 acres of critical softwood in the deeryard." By contrast, Petitioners are prevented by the subject regulation from harvesting their timber or to otherwise exclude the owls from their property. The state has exerted as much control over Petitioners' property as if it had acquired a formal easement. Or. Admin. R. 629-665-0210(1)(b); *cf. North Dakota*, 460 U.S. 300 (which involved waterfowl nesting site easements purchased by the federal government under the Migratory Bird Conservation Act, 16 U.S.C.A. §715, *et seq.*). Petitioners have been forced to have their timber "occupied by an adult pair of spotted owls, capable of breeding." Or. Admin. R. 629-665-0210(2).

The subject regulation not only imposes a wildlife servitude upon Petitioners' timber, but it also singles them out to bear a burden that is not imposed upon many of their neighbors who own commercial timberlands. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Tahoe-Sierra*, 122 S. Ct at 1488-89. The subject regulation does not require that all owners of commercial timberlands set aside timber to provide nesting habitat for spotted owls; it is directed only at those who happen to have an existing nesting site on their property or within the 70-acre protected area. Spotted owls require mature or old-growth timber for nesting sites. Department of Interior, *Recovery Plan for Northern Spotted Owl—DRAFT* (1992) ("Recovery Plan"), page 19 (App. N; 58a-59a). Many of Petitioners' neighbors, including the federal government,

have harvested much, if not all of their mature timber in the area, and are now harvesting replacement crops of trees before they reach maturity in order to avoid having them become spotted owl habitat.[5] As one scholar has pointed out, "only latecomers bear the cost of protecting listed species, even though, from a broader perspective, it is the early developers who brought the species to near extinction in the first place." Bradley C. Karkkainen, *Biodiversity and Land*, 83 Cornell L. Rev. 1, 93 (Nov. 1997). Professor Karkkainen goes on to state: "The costs are heavily concentrated on a relatively small number of individuals that compose a distinct subgroup of a much larger beneficiary class." *Id.* at 95. In this case, Petitioners derive no benefit from having their timber designated as a public "resource" spotted owl nesting site. Or. Admin. R. 629-665-0000 and 629-665-0010. During the four years that this case has been pending they have annually paid taxes on the subject 40 acres, while at the same time they have been barred from deriving any income from the timber

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[5] The federal government owns 558,000 acres of land in Linn County, Oregon, or 40% of the total acreage. Atlas of Oregon, page 84 (University of Oregon, 2d ed. 2001). The United States Forest Service manages 468,000 acres (32%) of timberlands and the Bureau of Land Management ("BLM") manages another 90,000 acres (6%) of timberlands in Linn County, Oregon. *Id.* Under the Department of Interior's Recovery Plan, the FWS ended up protecting as critical habitat on federal lands 7.5 million acres, or a little less than half (48%) of the total acreage available as spotted owl roosting and foraging habitat on federal lands. (App. N at ix; 51a-53a.) The FWS did not designate any private lands as critical habitat for the owls. (*Id.* at 4; 54a-56a.) With regard to the Western Oregon Cascades' spotted owl "province," which includes that portion of Willamette National Forest in Linn County, the Recovery Plan states: "Owl populations within this province are moderately high, as is the amount of remaining habitat on federal lands. Areas with low owl numbers occur on 1) private lands, 2) checkerboard BLM lands at lower elevations, 3) checkerboard Forest Service lands in the Santiam Pass area, and 4) higher elevation forests near the Cascade Crest." (*Id.* at 51; 63a-65a.).

crop on it. In the meantime, much of the subject timber has blown down because of root rot and the wood is no longer of merchantable quality.[6]

As another scholar has stated: "Unlike zoning regulations that spread the burdens and benefits so as to create an average reprocity of advantage, the ESA [and state regulations such as the subject one based upon it] burdens only a few landowners who unfortunately provide a habitat for a protected species." Stephen P. Foley, Comment, *Does Presenting a "Take" Constitute an Unconstitutional "Taking"?: An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act*, 14 UCLA J. Envtl. L. & Pol'y 327, 344 (1995-96).

By failing to provide compensation to those owners who do have spotted owl nesting habitat, government is encouraging other owners of private timberlands to manage their timber so that trees are harvested earlier, before they can become suitable spotted owl nesting habitat. *See* Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 Cumb. L. Rev. 1, 45 (1993-94). Otherwise, as in this case, an occupation by owls will render their timber without any commercial value. The government's short-sighted policy serves neither the best interests of the owls, nor that of those citizens whose timber is appropriated for owl habitat.

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[6] In an attempt to satisfy the "ripeness" requirement for a regulatory takings claim as put forth in *Boise Cascade* (991 P.2d at 573-74), Petitioners prepared a habitat conservation plan as required by the ESA and submitted an ITP application to the FWS for the owls. After denying Petitioners an ITP because they would not agree to place harvest restrictions on their other timber, the FWS earlier this year determined that because of the extensive "blow downs" in the protected area that there was no longer enough timber left standing to make it a suitable nesting site. The FWS by letter dated June 3, 2002, withdrew its objection to Petitioners' harvesting the subject timber. The letter is reproduced as Appendix O.

Petitioners' tree farm is located about six miles southeast of the town of Sweet Home, Oregon. It was in another case involving that community and spotted owls, but where a "taking" of the species rather than property was the issue, that Justice Scalia prophetically wrote: "The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." *Babbitt*, 515 U.S. at 714.

Unlike the ESA (16 U.S.C.A. § 1534 (West 2000)), under Oregon law the State has prohibited its agencies from exercising the power of eminent domain to condemn conservation easements for wildlife habitat. Or. Rev. Stat. § 271.725(1). Instead, by regulation the State merely forces landowners to leave in its natural state any habitat the State desires to be occupied by wildlife by simply declaring it to be a public resource. Or. Admin. R. 629-665-0000 and 629-665-0010.

As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922): "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL AND STATE COURTS.

The Oregon Court of Appeals' decision in *Boise Cascade* and its affirmance in this case, without opinion, the trial court's judgment dismissing of Petitioners' physical taking claim, is contrary to the basic takings jurisprudence of this Court as stated in *Tahoe-Sierra*, *Loretto*, *Yee*, and *Kaiser Aetna*.

Moreover, there is a split among the lower courts in cases involving wildlife over whether a property owner can sustain a claim based on a physical taking theory. The better-reasoned cases focus on whether the property owners have the right under the subject law to exclude the animals from their land. If not, the forced occupation imposes a wildlife servitude. *Southview Assoc.*, 980 F.2d 84; *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942) ("If the Government wishes to do more in the way of protecting migratory birds than prohibiting their slaughter, . . . it must acquire some proprietary interest in the areas suitable for such uses."); *State v. Herwig*, 117 N.W.2d 335, 340 (Wis. 1962) (holding that in order to protect bird nesting habitat on private land "the state should acquire whatever rights or easements are needed by purchase, lease or condemnation"); *Shellnut v. Ark. State Game & Fish Comm'n*, 258 S.W.2d 570, 574 (Ark. 1953) (taking of private property for a wildlife refuge); *Moerman v. State*, 21 Cal. Rptr. 2d 329, 333-34 (Cal. Ct. App. 1993) (holding that there was no taking under *Loretto* because the landowner had the right to exclude elk from his property).

Since the Oregon appellate court decided *Boise Cascade*, the United States Court of Federal Claims has held that the federal government was liable for a physical taking under the ESA for private water rights appropriated to protect endangered fish species. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318-19 (2001). Even more recently, after this Court's decision in *Tahoe-Sierra*, the Federal Circuit in another case involving Boise Cascade Corporation adopted the reasoning of the Oregon court and held that the plaintiff could not state a claim for a physical taking because the government "did not force the owls to occupy Boise's land." *Boise Cascade Corp. v. U.S.*, 296 F.3d 1339, 1354-55 (Fed. Cir. 2002).

There is a conflict between the wildlife taking cases, such as the *Boise Cascade* decisions, that avoid an exclusion analysis, and hold that there can be no physical taking based

upon having to submit to an occupation by wildlife because government has no control over wildlife, and the cases cited above. *See also Christy*, 857 F.2d 1324; *Fla. Game & Fresh Water Fish Comm'n*, 636 So. 2d 761; *Sierra Club*, 26 Cal. Rptr. 338. These cases of course also ignore that government has authorized the occupation and is controlling the property for its own use in order to protect wildlife habitat. *Loretto*, 458 U.S. at 432 n9.

As this Court recently stated a physical taking is "typically obvious and undisputed" and should be "easily identified." *Tahoe-Sierra*, 122 S. Ct. at 1478 n.17, 1479. While physical appropriations of private property for a public purpose may be obvious to landowners, as the foregoing cases indicate, they are not always easily identified by the lower courts and all too often they are disputed by the government through a long and expensive litigation process. *Id.* at 1478 n.17; *e.g. Tulare Lake*, 49 Fed. Cl. at 318; *Boise Cascade*, 991 P.2d at 570; *see also Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (1990), *aff'd*, 95 F.3d 1422 (1996), *aff'd*, 526 U.S. 687, 698 (1999) (which, although tried as a regulatory taking claim, in part involved habitat for the endangered Smith's Blue Butterfly). By arguing that such cases should be analyzed as a regulatory taking rather than as a physical taking, government stands a much better chance of avoiding liability for having made use of a landowner's property for a public purpose.

In addition to the defense of ripeness, the government's argument for a regulatory analysis is that its need to protect threatened or endangered wildlife habitat trumps almost any limitation imposed on the owner's productive use of the property.[7] *Tulare Lake*, 49 Fed. Cl. at 318-19. From the

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[7] "FWS personnel recognize that property owners will have difficulty getting to court prior to exhausting the HCP process and assume that the government will withstand takings challenges if it permits a landowner at least some use of his property." Thompson, *supra*, at 336.

government's standpoint, the property owner's investment-backed expectations, compared to the need to protect endangered or threatened wildlife, are irrelevant. To many in government, the protection of such wildlife, like the protection of historic sites, must be protected at all costs; however, because those costs may be more than most taxpayers are willing to bear, it is often the government's position supported by some in the academic community that they should be borne by the landowner and not the public.[8] *Id.*; *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138-42 (1978) (Rehnquist, J.,, dissenting).

State courts such as those in Oregon are well aware of the impact takings cases can have on the public treasury and have not been hesitant to seek ways to avoid this Court's takings jurisprudence. *See* Justices Scalia and O'Connor dissenting from a denial of certiorari in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994); *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993) *rev'd*, 512 U.S. 374 (1994).

There certainly can be no dispute that Petitioners' timber has been appropriated for a public purpose in this case, which brings the facts of this case squarely within the definition of a physical taking. *Tahoe-Sierra*, 122 S. Ct. at 1478-79. The

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[8] In support of this view, a number of academics argue that this Court has taken an anachronistic approach to takings cases involving natural habitat, based upon an archaic view of property rights that must change in order to save the environment. James P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 Envtl. L. 735, 737 (1993) ("The natural systems upon which we as a community rely for survival must be protected, and if private property rights must be sacrificed to achieve that protection, so be it."); *see also* David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv. Envtl. L. Rev. 311 (1988); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 Stan. L. Rev. 1433, 1445 (1993); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. Rev. 77, 105-06 (1995).

Oregon Supreme Court was made aware of this Court's opinion in *Tahoe-Sierra* and chose to ignore it before denying review in this case. (*See* Petitioners' Motion to Reconsider Court's Prior Opinion in this Case Based upon a Recent U.S. Supreme Court Decision That Is Controlling, Which Overrules This Court's Earlier Dictum, filed May 28, 2002 with the Oregon Court of Appeals, reproduced as Appendix P ("App P").) Likewise, the *Boise Cascade* case is presently before the Oregon Court of Appeals for the third time, and it has refused to reconsider its 1999 decision concerning the physical taking issue in light of *Tahoe-Sierra*. (*See* App. P and Petitioners on Review's Motion for Leave to File Memorandum of Additional Authorities, filed May 28, 2002 with the Oregon Supreme Court, reproduced as Appendix Q.)

CONCLUSION

Petitioners respectfully urge the Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel for Petitioner

August 30, 2002

APPENDICES

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

[Filed: December 5, 2001]

Linn County Circuit
Court No. 980649
A108914

MARSHA SEIBER and ALVIN SEIBER,
Appellants,

and

OREGON SMALL WOODLANDS ASSOCIATION,
Plaintiff,

v.

STATE OF OREGON, by and through the
Oregon State Board of Forestry,
Respondent,

and

AUDUBON SOCIETY OF PORTLAND, OREGON TROUT, INC.,
PACIFIC COAST FEDERATION OF FISHERIES, and
INSTITUTE FOR FISHERIES RESOURCES,
Intervenors-below.

APPELLATE JUDGMENT

Argued or submitted on briefs: November 9, 2001

Before: Edmonds, Presiding Judge, and Armstrong and Kistler, Judges

Attorney for Appellants: Phillip D. Chadsey

Attorney for Respondent: David F. Coursen

John T. Bagg filed a brief *amicus curiae* for Audubon Society of Portland; Salem Audubon Society; Oregon Trout, Inc.; Pacific Coast Federation of Fisheries; and Institute For Fisheries Resources

Peggy Hennessy filed a brief *amicus curiae* for Dr. Jane Lubchenco, Dr. Stevan J. Arnold, Dr. Andrew R. Blaustein, Dr. Michael Lynch, Dr. Emelia P. Marins, Dr. E. Charles Meslow

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[X] Costs allowed, payable by: Appellants

MONEY JUDGMENT

Judgment #1

Creditor(s): State of Oregon, by and through the Oregon State Board of Forestry

Debtor(s): Marsha Seiber; Alvin Seiber

Costs: $ 326.50

Attorney fees: $ -0-

TOTAL AMOUNT: $ 326.50

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment

Effective Date: July 24, 2002

COURT OF APPEALS

(seal)

APPENDIX B

IN THE SUPREME COURT FOR
THE STATE OF OREGON

Linn County Circuit Court
case no. 980649
SC S49348
CA A108914

MARSHA SEIBER and ALVIN SEIBER,
Plaintiffs-Appellants,
Petitioners on Review,

and

OREGON SMALL WOODLANDS ASSOCIATION,
Plaintiff,

v.

STATE OF OREGON, by and through the
Oregon State Board of Forestry,
Defendant-Respondent,
Respondent on Review,

and

AUDUBON SOCIETY OF PORTLAND, OREGON TROUT, INC.,
PACIFIC COAST FEDERATION OF FISHERIES, and
INSTITUTE FOR FISHERIES RESOURCES,
Intervenors-below.

ORDER DENYING REVIEW

Upon consideration by the court.

The Court has considered the petition for review and orders that it be denied.

Dated this 4th day of June 2002.

/s/WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

c: Phillip D. Chadsey
James N. Westwood
Scott E. Crawford
David Farris Coursen
John M. Groen

APPENIDX C

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

[Filed: December 5, 2001]

Linn County Circuit
Court No. 980649
A108914

MARSHA SEIBER and ALVIN SEIBER,
Appellants,

and

OREGON SMALL WOODLANDS ASSOCIATION,
Plaintiff,

v.

STATE OF OREGON, by and through the
OREGON STATE BOARD OF FORESTRY,
Respondent,

and

AUDUBON SOCIETY OF PORTLAND, OREGON TROUT, INC.,
PACIFIC COAST FEDERATION OF FISHERIES, and INSTITUTE
FOR FISHERIES RESOURCES,
Intervenors-below.

Argued or submitted on briefs: November 9, 2001

Before: Edmonds, *Presiding Judge*, and Armstrong and Kistler, *Judges*

Attorney for Appellants: Phillip D. Chadsey

Attorney for Respondent: David F. Coursen

John T. Bagg filed a brief *amicus curiae* for Audubon Society of Portland; Salem Audubon Society; Oregon Trout, Inc.; Pacific Coast Federation of Fisheries; and Institute For Fisheries Resources

Peggy Hennessy filed a brief amicus *curiae* for Dr. Jane Lubchenco, Dr. Stevan J. Arnold, Dr. Andrew R. Blaustein, Dr. Michael Lynch, Dr. Emelia P. Marins, Dr. E. Charles Meslow

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY
AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No Costs Allowed.

[X] Costs allowed, payable by: Appellants

APPENDIX D

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

Case Mo. 980649

MARSHA SEIBER, ALVIN SEIBER, and the
OREGON SMALL WOODLANDS ASSOCIATION,
Plaintiffs,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

JUDGMENT

On March 1, 1999, this matter came before the Honorable Daniel R. Murphy, Circuit Court Judge, for hearing on Plaintiffs' [Seibers'] Motion for Partial Summary Judgment on the Issue of Liability, Plaintiffs' [Seibers'] Motion for Summary Judgment on Defendant's Affirmative Defenses, Plaintiff OSWA's Motion for Partial Summary Judgment on the Issue of Liability, and on Defendant's Motion for Summary Judgment. Plaintiffs appears by and through their attorney, Phillip D. Chadsey, and Defendant appeared by and through its attorney, Assistant Attorney General Lore Bensel.

NOW, THEREFORE, IT IS HEREBY ADJUDGED that:

1. Defendant Oregon is allowed summary judgment against Plaintiff OSWA on all claims. All of OSWA's claims shall be dismissed with prejudice.

2. Defendant Oregon is allowed summary judgment against Plaintiffs Seibers on all claims. Seibers' claim under

Count One of the Third Claim (physical occupation) and Seibers' claim under the Second Claim to the extent that it is based on alleged physical occupation are dismissed with prejudice. All of Seibers' remaining claims shall be dismissed without prejudice.

3. Defendant Oregon's counterclaim is dismissed as moot. If Seibers refile any of their claims, Oregon may refile its counterclaim.

4. Defendant Oregon is awarded its costs and disbursements, including a prevailing party fee under ORS 20.190(2)(a)(A).

SO ADJUDGED this 8 day of December, 1999.

/s/ Daniel R. Murphy
DANIEL R. MURPHY
CIRCUIT COURT JUDGE

Submitted by: William F. Cloran, #72050
Attorney-in-Charge
Of Attorneys for Defendant

APPENDIX E

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

Case No. 980649

MARSHA SEIBER, ALVIN SEIBER, and the OREGON SMALL WOODLANDS ASSOCIATION,

Plaintiffs,

v.

STATE OF OREGON, by and through THE OREGON STATE BOARD OF FORESTRY,

Defendant.

ORDER FOR CROSS MOTIONS FOR SUMMARY JUDGMENT

HAVING COME before the Court on Plaintiffs' [Seibers'] Motion for Partial Summary Judgment on the Issue of Liability, Plaintiffs' [Seibers'] Motion for Summary Judgment on Defendants' Affirmative Defenses, Plaintiff OSWA's Motion for Partial Summary Judgment on the Issue of Liability, and on Defendant's Motion for Summary Judgment; all parties having submitted briefs, affidavits and evidence in support of or in opposition to the motions; oral argument having been held on all of the motions on March 1, 1999; and there appearing good cause:

THE COURT FINDS that the following facts are undisputed:

1. Plaintiffs Marsha and Alvin Seiber (Seibers) own approximately 200 acres (Seiber property) of which approximately 145 acres is mature forest.

2. There are over 3 million board feet of merchantable timber on the Seiber property.

3. The Board of Forestry denied a written plan submitted by the Seibers to harvest timber on 37 acres of their land (the project site).

4. The project site is identified as a spotted owl active resource site for a pair of owls known as the Little Wiley Pair. This pair of owls was observed in the area between 1991 and 1996. No observations were made in 1997 or 1998. The Court has not been provided information about whether any observations have occurred in 1999.

5. Plaintiff the Oregon Small Woodlands Association (OSWA) does not own any forestland property.

6. Seibers have not yet made a good faith effort to obtain an Incidental Take Permit for spotted owls from the U.S. Fish and Wildlife Service.

THE COURT'S DISPOSITIVE RULINGS are as follow:

1. All of OSWA's motions for summary judgment are denied.

2. Defendant the State of Oregon's (Oregon's) motions for summary judgment seeking dismissal of all of the claims of OSWA is allowed on the grounds that OSWA lacks standing.

3. Oregon's motion for summary judgment seeking dismissal of Plaintiffs' Third Claim, First Count (physical occupation) is allowed based on the Court of Appeal's decision in *Boise Cascade v. State of Oregon (Boise III)*, ___ Or___ (CA A100855; November 10, 1999) regarding whether there is a physical occupation of the Seiber property by Oregon. Further, there is no physical occupation resulting in a taking under the Oregon Constitution for the same reasons. Oregon's motion for summary judgment seeking dismissal of Plaintiffs' Second Claim is allowed to the extent that it is based on an alleged physical occupation.

4. Oregon's motions for summary judgment seeking dismissal of all of the claims (including all counts) of the Second Amended Complaint is allowed based on the Court of Appeal's decision in *Boise III* regarding ripeness and the exhaustion of administrative remedies.

5. Seibers' motion for summary judgment requesting that Oregon's Ninth Affirmative Defense (ripeness for Second and Third Claims because no final decision) be stricken is denied based on the Court of Appeal's decision in *Boise III* regarding ripeness and the exhaustion of administrative remedies.

6. Since it is anticipated that this case might be appealed and that the Court of Appeals decision in *Boise III* may be appealed to the Oregon Supreme Court, this Court makes the following rulings so that the parties are aware of them and can resolve them should this case continue on appeal. The decisions below, except one, were made prior to the Court of Appeal's decision in *Boise III*, and further analysis of each of these rulings in light of the Court of Appeal's decision might change these decisions in some manner. However, in light of the long delay in deciding this case and the opportunity presented today to resolve it the Court chooses not to belabor these further. Seibers' motions for summary judgment are allowed and denied as follows:

a. The motion requesting that Oregon's First and Second Affirmative Defenses jurisdiction for contested cases for Second and Third Claims, and jurisdiction for rule validity for First Claim) be stricken is allowed based on *Boise Cascade Corp. v. Board of Forestry (Boise I)*, 131 Or App 538, 546 (1994), *aff'd* 325 Or 185 (1997), in that it is not the board's action which is on appeal but the consequence of that action, namely, the taking.

b. The motion requesting that Oregon's Third and Fourth Affirmative Defenses (jurisdiction for rule validity for First Claim, and first exercise of concurrent jurisdiction for Second and Third Claims) be stricken is allowed based on *Boise Cascade Corp. v. Board of Forestry (Boise I)*, 325 Or 185, 196 (1997).

c. The motion requesting that Oregon's Fifth, Sixth, Seventh and Eighth Affirmative Defenses (issue preclusion and claim preclusion for all claims) be stricken is allowed based on *Boise I*, 325 Or at 196, in that the traditional basis for issue preclusion from an agency decision does not apply here because "taking" issues fall in an area adjudicated exclusively by the courts.

d. The motion requesting that Oregon's Tenth Affirmative Defense (ripeness for Second and Third Claims because of timeline) be stricken is allowed. because timber is commonly sold in advance of harvest and the issue has now been rendered moot by the passage of time.

e. The motion requesting that Oregon's Eleventh Affirmative Defense (value for Second and Third Claims) be stricken is allowed because whether the federal Endangered Species Act prevents logging of the subject timber does not relieve the state of its liability for doing so. The state has not been pre-empted by federal regulations. Federal law prohibits destruction of the owls and their habitat. This may be accomplished through a moratorium on logging an owl habitat, but the federal law does not render it necessarily so.

f. The motion requesting that Oregon's Twelfth and Thirteenth Affirmative Defenses (act of God or nature for all claims) be stricken is allowed because it

is the state, and not the owls, which is interfering with the Seibers' use of their land. The state has not been preempted by the owls.

g. The motion requesting that Oregon's Fourteenth and Fifteenth Affirmative Defenses (illegality for plaintiffs or for defendants for Second and Third Claims) be stricken is allowed for the same reasons cited above.

h. The motion requesting that Oregon's Sixteenth Affirmative Defense (waiver for Second and Third claims) be stricken is allowed because failure to appeal the Oregon Department of Forestry's denial of the logging plan does not waive the Seibers' constitutional right to compensation for a taking. The Court is also persuaded by the Seibers' argument that a final order was not received from the Board of Forestry until this year.

i. The motion requesting that Oregon's Seventeenth Affirmative Defense (failure to state a claim for the First Claim) be stricken is allowed because under *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or 458, 477 (1995) it is clear that an administrative rule which effects a taking exceeds statutory authority and would be invalid. If the Seibers prevail in their claim for a taking they could prevail in having the rule declared invalid on that basis.

j. The motion requesting that Oregon's Eighteenth, Nineteenth and Twentieth Affirmative Defenses (failure to state a claim for the Oregon claim, for the physical occupation count of the federal claim, and for the economic theory count of the federal claim) be stricken is allowed for the reasons set out in *Boise I*, 131 Or App at 544-545 and 325 Or at 198 to 200 and n. 14.

k. The motion requesting that Oregon's Twenty-First Affirmative Defense (Mr. Seiber not real party in interest) be stricken is allowed in that he has been deeded an interest in the property. Seiber Aff. ¶ 12, Ex 1.

1. The motion requesting that Oregon's Twenty-Second Affirmative Defense (failure to join the U.S.) be stricken is allowed in that the Seibers have no cause of action against the United States.

m. The motion requesting that Oregon's Twenty-Third Affirmative Defense (attorney fees) be stricken is denied because the statutory basis for attorneys fees must be alleged.

n. The motion requesting that Oregon's Twenty-Fourth and Twenty-Fifth Affirmative Defenses (public nuisance, and land is held subject to public interest in wildlife) be stricken is allowed because there is no law supporting the assertion that the public trust doctrine bars recovery under a claim of inverse condemnation.

7. The Court makes no rulings regarding Oregon's Twenty-Sixth through Twenty-Eighth and Oregon's Thirtieth through Thirty-Three Affirmative Defenses (OSWA's capacity, real party status and venue; class action improper; no amount plead; jurisdiction to challenge finding for all claims; failure to state a claim for legitimate state interest count of the federal claim).

8. There is no just reason for delay in the entry of the judgment.

9. Oregon is the prevailing party and entitled to an award of costs and disbursements, including a prevailing party fee under ORS 20.190(2)(a)(A).

IT IS HEREBY ORDERED that:

1. Defendant Oregon is allowed summary judgment against Plaintiff OSWA on all claims. All of OSWA's claims shall be dismissed with prejudice.

2. Defendant Oregon is allowed summary judgment against Plaintiffs Seibers on all claims. Seibers' claim under Count One of the Third Claim (physical occupation) and Seibers' claim under the Second Claim to the extent that it is based an alleged physical occupation are dismissed with prejudice. All of Seibers' remaining claims shall be dismissed without prejudice.

3. Defendant Oregon's counterclaim is dismissed as moot. If Seibers refile any of their claims, Oregon may refile its counterclaim.

4. Defendant Oregon is awarded its costs and disbursements, including a prevailing party fee under ORS 20.190(2)(a)(A).

DATED this _____ day of _____, 1999.

_____
DANIEL R. MURPHY
Circuit Court Judge

Prepared and Submitted by:
Lore Bensel, #89164
William F. Cloran, #72050
Assistant Attorneys General
Of Attorneys for Defendant

APPENDIX F

GLEN D. BAISINGER
Judge
CAROL R. BISPHAM
Judge
JOHN A. MCCORMICK
Judge
RICK J. MCCORMICK
Judge
DANIEL R MURPHY
Judge

[seal]

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CIRCUIT COURT OF OREGON
TWENTY-THIRD JUDICIAL DISTRICT

November 10, 1999

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Bellevue, WA 98004

Re: Seiber v State of Oregon
Linn County Circuit Court No: 98-0649

Counsel:

This matter came on for hearing on March 1, 1999 and the court took the matter under advisement.

Certain facts appear undisputed: plaintiffs Seiber own approximately 200 acres of which about 145 acres are mature forest. There are over 3 million board feet of merchantable timber on the property. The Board of Forestry (BOF) denied a

written plan submitted by plaintiffs Seiber to harvest timber on 37 acres of their land and this is referred to by the BOF as the "project site". This project site is identified as a spotted owl protective active resource site for a pair of owls known as the Little Wiley Pair. This pair of owls was observed in the area between 1991 and 1996. No observations have been made in 1997 or 1998. The court has not been provided information about whether any observations have occurred in 1999.

Dispositive rulings:

Plaintiff Oregon Small Woodlands Association's motion for partial summary judgment is denied.

Defendant's Motion for Summary Judgment against the Plaintiffs' First Claim (Loretto) allowed based on the Court of Appeal's decision in *Boise Cascade v State of Oregon (BOF)*, ___ Or App ___, (CA A100855) decided November 10, 1999.

Defendant's Motion for Summary Judgment dismissing claims made by the Oregon Small Woodlands Association on the grounds that OSWA lacks standing is allowed.

Defendant's Motion for Summary Judgment dismissing all counts of the Second Amended Complaint is allowed because plaintiff failed to exhaust administrative remedies as required in *Boise Cascade v State of Oregon (BOF)*, ___ Or App ___, (CA Al00855) decided November 10, 1999.

Prior to the Boise Cascade opinion issued on November 10, 1999 this Court reached certain decisions concerning the Plaintiff's Motions for Partial Summary Judgment. Those decisions are not now necessary to resolve this case at this stage. However, since it is anticipated this case might be appealed and that the Court of Appeals case issued today may be appealed to the Supreme Court these rulings are being included herein so that the parties are aware of them and can

resolve them should this case continue on appeal. The decisions below, except one, were made prior to the Court of Appeal's decision of this date, and further analysis of each of these decisions in light of today's case might change these decisions in some manner. However, in light of the long delay in deciding this case and the opportunity presented today to resolve it the Court chooses not to belabor these further.

Plaintiff's motions for partial summary judgment are allowed and denied as follows:

1. Allowed against the First Affirmative Defense and Second Affirmative Defense based on *Boise Cascade Corp. v Board of Forestry*, 131 Or App 538, affmd. 325 Or 185 (1997), also known as *Boise Cascade I*, at 131 Or App 538 at 546, in that it is not the board's action which is on appeal but the consequence of that action, namely, the taking.

2. Allowed against the Third Affirmative Defense and the Fourth Affirmative Defense based on the decision in *Boise Cascade I* at 325 Or 185 at 196.

3. Allowed against the Fifth, Sixth, Seventh and Eighth Affirmative Defenses based on *Boise Cascade I*, 325 Or App 538 at 196 in that the traditional basis for issue preclusion from an agency decision does not apply here because "taking" issues fall in an area adjudicated exclusively by the courts.

4. Denied against the Ninth Affirmative Defense based on the holding in *Boise Cascade v State of Oregon (BOF)*, ___ Or App ___, (CA A100855) decided November 10, 1999.

5. Allowed against the Tenth Affirmative Defense because the timber is commonly sold in advance of harvest and the issue has now been rendered moot by the passage of time.

6. Allowed against the Eleventh Affirmative Defense because whether the ESA prevents logging of the subject timber does not relieve the state of its liability for doing so. The state has not been here pre-empted by federal regulations. Federal law prohibits destruction of the owls and their habitat. This may be accomplished through a moratorium on logging an owl habitat, but the federal law does not render it necessarily so.

8. Allowed against the Twelfth and Thirteenth Affirmative Defenses because it is the state, and not the owls, which is interfering with the plaintiff's use of their land. The state has not been preempted by the owls.

9. Allowed against the Fourteenth and Fifteenth Affirmative Defenses for the same reasons cited above.

10. Allowed against the Sixteenth Affirmative Defense because failure to appeal the ODF's denial of the logging plan does not waive their constitutional right to compensation for a *taking*. The court is also persuaded by plaintiff's argument that a final order was not received from the Board until this year.

11. Allowed against the Seventeenth Affirmative Defense because under *GTE Northwest, Inc. v Public Utility Commission*, 321 Or 458 at 477 (1995) it is clear that an OAR which effects a taking exceeds statutory authority and would be invalid. If plaintiff prevails in their claim for a taking they could prevail in having the rule declared invalid on that basis.

12. Allowed against the Eighteenth, Nineteenth and Twentieth Affirmative Defenses for the reasons set out in *Boise Cascade I*, 131 Or App at 544-545; 325 Or at 198 n 14 to 200.

13. Allowed against the Twenty-First Affirmative Defense in that he has been deeded an interest in the property, (Sieber Aff, ¶ 2, Ex 1).

14. Allowed against the Twenty-Second Affirmative Defense in that the plaintiff's have no cause of action against the United States.

15. Denied against the Twenty-Third Affirmative Defense because the statutory basis for attorneys fees must be alleged.

16. Allowed against the Twenty-Fourth and Twenty-Fifth Affirmative Defenses because there is no law supporting the assertion that the public trust doctrine bars recovery under an claim of inverse condemnation.

Ms Bensel may submit an order in accordance with these rulings.

Sincerely yours,

/s/ Daniel R. Murphy
DANIEL R. MURPHY
CIRCUIT JUDGE

APPENDIX G

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 665. SPECIFIED RESOURCE SITE PROTECTION RULES

Current through August 15, 2000

629-665-0210

Interim Requirements for Northern Spotted Owl Nesting Sites

(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;

(b) Prevention of disturbances resulting from operation activities which caused owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.

(2) For the purpose of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls,

capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3)(a) For the purposes of this rule, suitable spotted owl habitat means and includes:

(A) A stand of trees with moderate to high canopy closure (60 to 80%); a multi-layered, multi-species canopy dominated by large overstory trees (greater than 30 inches in diameter at breast height); a high incidence of large trees with various deformities (e.g., large cavities, broken tops, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximating the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) of this section are not suitable habitat.

(4) (For information only) Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. Compliance with subsection(1) of this rule is not in lieu of compliance with any federal requirements related to the federal Endangered Species Act.

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

APPENDIX H

DEPARTMENT OF FORESTRY
DIVISION 680
RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES

629-680-0000

Purpose

(1) OAR 629-680-0000 to 0430 shall be known as the Resource Site Inventory and Protection Process Rules.

(2) The purpose of the rules in OAR 629, Division 680 is to set criteria to inventory and protect special resources described in ORS 527.710 (3)(a) on forestlands regulated by the Forest Practices Act. Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and aquatic life. Consistent with ORS 527.630, it is the policy of these rules to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water and fish and wildlife resources that assures the continuous benefits of those resources for future generations of Oregonians.

APPENDIX I

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES

Current through August 15, 2000

629-680-0010

Definitions

In addition to the definitions listed in OAR 629-600-0100, as used in OAR Chapter 629, Division 680:

(1) "Critical period of use" means the time of year the State Forester determines a species is sensitive to disturbance at a resource site.

(2) "Disturbance" means actions which cause birds to flush from the resource site.

(3) "Endangered species" means any fish or wildlife species identified as "endangered" on lists that are adopted, by rule, by the Oregon Fish and Wildlife Commission or are federally listed as "endangered" under the Endangered Species Act of 1973 as amended.

(4) "Listed species" means a species adopted by the Board under OAR 629-680-0200.

(5) "Site productivity" means the ability of a resource site to produce the benefits for which it is being protected. As an example, nesting site productivity is measured by the number of young birds successfully raised. For a roosting site, productivity is measured by the number of birds roosting over a given time. Watering site productivity is measured by the number of band-tailed pigeons that visit the resource site over a given time.

(6) "Threatened species" means any fish or wildlife species identified as "threatened" on lists that are adopted, by rule, by the Oregon Fish and Wildlife Commission or are federally listed as "threatened" under the Endangered Species Act of 1973 as amended.

APPENDIX J

OREGON ADMINISTRATIVE RULES COMPILATION CHAPTER 629. DEPARTMENT OF FORESTRY EMERGENCY FIRE COST COMMITTEE DIVISION 680. RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES

Current through August 15, 2000

629-680-0100

Process for Board Evaluation of Threatened and Endangered Fish and Wildlife Species that use Resource Sites that are Sensitive to Forest Practices

(1) When a species is listed as threatened or endangered by state or federal authorities, the Board shall adopt rules to protect resource sites that are used by those species and that are sensitive to forest practices. The following process shall be used when the Board develops protection rules for these resource sites:

(a) The Board's evaluation shall be based on the best available information summarized in a technical review paper. The paper must be submitted by those proposing protection for resource sites used by a threatened or endangered species. The paper may be written by the State Forester, another agency, an organization or a person. The paper shall demonstrate how the resource sites are sensitive to forest practices. The paper may rely upon information used during the listing process and must:

(A) Identify the resource sites used by the species;

(B) Identify forest practices that conflict with the resource sites;

(C) Evaluate the biological consequences of the identified conflicts; and

(D) Propose protection requirements and exceptions for the resource sites.

(b) The State Forester shall review the technical paper submitted under subsection(1)(a) of this rule. The review shall include an evaluation of the literature used, consultation with technical experts and a technical review by experts chosen by the State Forester. The State Forester shall submit a report of this review to the Board.

(c) The Board shall review and accept or reject the information presented in subsections(1)(a) and (b) of this rule;

(d) Using the technical review paper and the State Forester's report, plus other available information for the species, the Board shall:

(A) Identify the resource sites for the species;

(B) Identify forest practices that conflict with the resource sites and evaluate the consequences of those conflicts;

(C) Determine the protection requirements for the resource sites; and

(D) Determine any exceptions criteria.

(2) The Board shall adopt protection requirements and exception criteria for resource sites used by the threatened or endangered species.

(3) The State Forester shall maintain an inventory of protected resource sites that are used by threatened or endangered species.

(4) When a threatened or endangered species is de-listed by the Oregon Fish and Wildlife Commission or the U.S. Fish and Wildlife Service, the Board shall determine whether continued protection of resource sites is warranted:

(a) If the Board determines that continued protection rules are warranted, the rules shall be promulgated under the appropriate statutory authority;

(b) If the Board determines that continued protection rules are not warranted, existing rules shall be repealed.

APPENDIX K

OREGON ADMINISTRATIVE RULES COMPILATION CHAPTER 629. DEPARTMENT OF FORESTRY EMERGENCY FIRE COST COMMITTEE DIVISION 680. RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES

Current through August 15, 2000

629-680-0220

Process for Determining Forest Practices Conflicts and Consequences; Protection Requirements for the Resource Site

(1) The following process shall be used by the Board to evaluate forest practices conflicts and consequences and in setting appropriate protection for the resource site. Using the technical review paper developed in OAR 629-680-0200, plus other available information for each listed species, the Board shall:

(a) Identify the resource site for each listed species;

(b) Identify forest practices that conflict with the resource site and evaluate the consequences of those conflicts;

(c) Determine the protection requirements necessary to protect the resource site;

(d) Determine any exceptions criteria.

(2) The Board shall adopt protection requirements and exception criteria for each species listed in OAR 629-665-0100.

APPENDIX L

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

No. 980649

MARSHA SEIBER, ALVIN SEIBER, and the
OREGON SMALL WOODLANDS ASSOCIATION,
Plaintiffs,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

SECOND AMENDED COMPLAINT (For Declaratory Relief and Inverse Condemnation for Action for a Regulatory Taking of Private Property for a Public Purpose)

Claim not subject to mandatory arbitration

Plaintiffs allege as follows:

INTRODUCTION

1.

Plaintiffs Marsha Seiber and Alvin Seiber (the "Seibers") are the owners of approximately 200 acres of property (the "Property") located in Linn County, which plaintiff Marsha Seiber acquired through inheritance in 1986. About 185 to 190 acres of the Property are commercial timberlands.

2.

Plaintiff Oregon Small Woodlands Association ("OSWA") is a nonprofit corporation organized under Oregon law whose members are nonindustrial private forest land owners.

3.

In August 1990, the Oregon State Forester (the "OSF") adopted an interim spotted owl policy precluding timber harvest within a 70-acre core area of the best available suitable habitat in the vicinity of the nest site. The Oregon State Board of Forestry (the "Board") subsequently adopted former OAR 629-24-809 (present OAR 629-665-0210), which requires protection of a 70-acre core area of suitable northern spotted owl habitat encompassing the nest site. That provision states in part:

> "[(1)](a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
>
> * * * *
>
> "(2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being *occupied* by an adult pair of spotted owls, capable of breeding." OAR 629-665-0210 (emphasis added).

4.

Timber of the kind found on the Property is considered to be suitable nesting habitat for spotted owls. In 1994 plaintiffs submitted an application to log some of the timber on the Property. At that time approximately 40 acres (the "Subject Timber") of the Property was designated by the OSF to be northern spotted owl habitat that plaintiffs were not allowed to log.

ISSUE PRECLUSION

5.

Before the commencement of this action, Boise Cascade Corporation ("Boise Cascade") brought an inverse condemnation action based on OAR 629-665-0210 against defendant in the Circuit Court of the State of Oregon for Clatsop County in which it alleged that it owned 65 acres of timber and that it could not log approximately 56 acres of it because defendant was protecting it as northern spotted owl nesting habitat pursuant to OAR 629-665-0210. In that action Boise Cascade alleged that the 56 acres of timber it was prohibited from logging had been taken for a public purpose because (1) Boise Cascade was required to submit to an occupation of its timber by the spotted owls as a nesting site based on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 102 S Ct 3164, 73 L Ed 2d 868 (1982) and (2) it had been denied all economically productive use of that timber based on *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798 (1992). Boise Cascade further alleged it was entitled to just compensation for the 56 acres of timber that had been taken for a public purpose, pursuant to the Fifth Amendment to the U.S. Constitution and Article I, section 18, of the Oregon Constitution. *Boise Cascade Corp. v. Board of Forestry (A79626)*, 131 Or App 538, 886 P2d 1033 (1994), *aff'd* 325 Or 185 (1997).

6.

Before the trial of that action, the circuit court found that as a matter of law Boise Cascade had been denied all economic productive use of the 56 acres of timber that was within the 70-acre core area because OAR 629-665-0210 prohibited Boise Cascade from logging it (*Lucas* Count). At trial the jury in its verdict made a finding of fact that OAR 629-665-0210 requires a property owner to submit to an

occupation of its timber by the owls for use as a nesting site (*Loretto* Count). The fact that OAR 629-665-0210 requires a property owner to submit to an occupation of its timber, and also deprives it of all economic productive use of its timber while it is being used as a nesting site, was fully litigated to a final judgment in that case, and defendant is bound by those findings in this action.

CLASS ALLEGATIONS

7.

By letter dated February 25, 1998 the plaintiffs gave defendant notice under ORCP 32 H(1)(b) of intent to bring a class action, if the subject regulation was not withdrawn.

8.

In addition to plaintiffs, there are numerous other private property owners in this State, many of whom are members of plaintiff OSWA, who are prevented from logging their timber because it has been included in a spotted owl nesting site pursuant to OAR 629-665-0210. The Seibers are members of OSWA and their inability to log the subject timber is typical of other private property owners who have been prevented from logging because it has been designated northern spotted owl nesting habitat due to the regulation.

9.

Pursuant to ORCP 32, plaintiffs bring this action on behalf of a class consisting of all private property owners who have had their property designated to be included in a 70-acre area for protection as a northern spotted owl nesting site under OAR 629-665-0210 and have not been able to log their timber for that reason.

10.

The class is likely to be so numerous that joinder of all members is unpracticable. Also because defendant will not

disclose the location of northern spotted owl nesting sites except on a need-to-know basis, plaintiffs have no means of ascertaining who all the other property owners are who have had their timber taken for a public purpose as the result of OAR 629-665-0210.

11.

There are questions of law or fact common to the class, and these common questions predominate over any questions affecting individual members.

12.

Plaintiffs' claims are typical of the claims of the class.

13.

Plaintiffs will fairly and adequately protect the interests of the class and their attorneys are experienced class action counsel.

14.

A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

FACTS GIVING RISE TO PLAINTIFFS' CLAIMS

15.

On February 4, 1998, plaintiffs filed Notification No. 98-791-40082 giving notice to the OSF of their desire to log the Subject Timber. In seeking to log the Subject Timber, plaintiffs were willing to not conduct logging operations while spotted owls might be nesting in the area (March 1 through September) or until the young spotted owls had fledged, to avoid any incidental harm to them. Their plan to log the Subject Timber was denied approval on February 19, 1998 on the ground that it failed to describe how the operation would be conducted to provide a 70-acre core area of suitable spotted owl habitat consistent with the requirements of OAR 629-665-0210(1)(a).

16.

Plaintiffs then made a timely appeal of the OSF's denial of their plan to log the Subject Timber to the Board. On or about March 27, 1998, the Board entered a final order that affirmed the denial of plaintiffs' plan. The denial of plaintiffs' written plan by the Board was a final administrative action prohibiting plaintiffs from logging the Subject Timber.

CLAIM ONE
(Declaratory Relief)

17.

Plaintiffs seek a declaratory judgment pursuant to ORS 28.010, *et seq.*, that OAR 629-665-0210 effects a taking of plaintiffs' property for a public purpose under the Fifth Amendment to the U.S. Constitution. Timber owners who are not permitted to log their timber on account of that rule are required to submit to a physical occupation of that property for use as a spotted owl nesting site; at the same time, they are denied all economic productive use of timber that cannot be logged on account of being preserved as a nesting site. The Board lacks the power of eminent domain authority to obtain a "conservation easement" for the purpose of obtaining property to be maintained as suitable spotted owl habitat; therefore, it did not have the authority to promulgate OAR 629-665-0210 which imposes a wildlife servitude for that purpose. *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or 458, 900 P2d 495 (1995).

CLAIM TWO
(Oregon Constitution)

18.

Plaintiffs reallege paragraphs 1 through 16 above.

19.

The 40 acres of the Property that plaintiffs have been prohibited from logging contain approximately 800,000 board feet of merchantable timber, and at the time the plan to log the Subject Timber was denied, the timber had a fair market value of approximately $306,000.

20.

The Board's denial of plaintiffs' plan to log the Subject Timber to preserve it as a spotted owl nest site and core area habitat constituted a taking of plaintiffs' property for a public purpose, which requires defendant to pay plaintiffs just compensation for the subject timber pursuant to Article I, section 18, of the Oregon Constitution.

21.

The Subject Timber that plaintiffs desire to log has no economic value unless harvested. The Board's action in denying plaintiffs the right to log the Subject Timber has denied plaintiffs of all economically productive use of that property interest.

22.

Plaintiffs are entitled to interest at the rate of 9 percent from March 27, 1998 and their reasonable attorney fees, pursuant to ORS 20.085.

CLAIM THREE

COUNT ONE

(*Loretto* Per Se Claim—U.S. Constitution)

23.

Plaintiffs reallege paragraphs 1 through 16, 19, and 22 above.

24.

The purpose of OAR 629-665-0210, together with OAR 629-665-0010 and OAR 629-665-0200, is to maintain and protect spotted owl nest sites and prevent their abandonment so they can be occupied annually by a pair of adult spotted owls that are capable of breeding.

25.

The Board's denial of plaintiffs' logging plan, which denial requires plaintiffs to leave their timber standing so it can be occupied as a spotted owl nesting site, constituted a taking of plaintiffs' property for a public purpose, which requires defendant to pay plaintiffs just compensation for their property under the Takings Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.

CLAIM THREE

COUNT TWO

(*Lucas* Per Se Claim—U.S. Constitution)

26.

Plaintiffs reallege paragraphs 1 through 16, 19, 21, and 22 above.

27.

The Board's action in denying plaintiffs the right to log their property deprived plaintiffs of all economically productive use of their merchantable timber and constituted a taking of plaintiffs' property for a public purpose, which requires defendant to pay plaintiffs just compensation for their property under the Takings Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.

CLAIM THREE

COUNT THREE

(*Agins* Claim—U.S. Constitution)

28.

Plaintiffs reallege paragraphs 1 through 16, 19, and 22 above.

29.

In 1987 the Oregon legislature enacted a state Endangered Species Act. ORS 496.192, which as a part of that Act, states that it is was not intended:

> "(1) * * * to require an owner of any commercial forestland or other private land to take action to protect a threatened species or endangered species, or to impose additional requirements or restrictions on the use of private land."

30.

That same session of the legislature also adopted ORS 527.630(1), which provides, in part, that "it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land."

31.

Defendant took no action to adopt what is now OAR 629-665-0210 or otherwise protect northern spotted owl habitat on private lands until the bird was declared a threatened species under the federal Endangered Species Act in July 1990. OAR 629-665-0120 was adopted as a result of the U.S. Fish & Wildlife Service (the "USFWS") adopting guidelines requiring the protection of a minimum of 70 acres of habitat around every northern spotted owl nest site.

32.

However, when the USFWS was required to designate critical habitat for the recovery of the species, it only designated lands owned by the federal government as critical habitat for the northern spotted owl. Further, the USFWS rescinded its 70-acre guideline as applying to private property after a federal court found that it had not been adopted according to law.

33.

Because it is the public policy of this State, as stated in ORS 496.192 and ORS 527.620(6) above, to not protect threatened species on private commercial forest lands and to encourage their use for sustained yield forestry, OAR 629-665-0210 does not substantially advance a legitimate state interest. Therefore, enforcement of OAR 629-665-0210 constitutes a taking of private property for a public purpose in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution.

Wherefore, plaintiffs pray that:

A. OAR 629-665-0210 be declared invalid because it takes private property for a public purpose;

B. The Seibers be awarded the sum of $306,000, together with interest thereon at the rate of 9 percent per annum from March 27, 1998;

C. The court award just compensation to all the other owners of timber who have been prevented from logging it as a result of OAR 629-665-0210 (and former OAR 629-24-809), in amounts to be determined at trial; and

D. The court award plaintiffs their reasonable attorney fees and costs.

DATED: August 20, 1998.

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY,
OSB No. 66028
Of Attorneys for Plaintiffs

Trial Attorney:
Phillip D. Chadsey

APPENDIX M

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

Case No. 980649

CLAIM NOT SUBJECT TO
MANDATORY ARBITRATION

MARSHA SEIBER, ALVIN SEIBER, and
THE OREGON SMALL WOODLANDS ASSOCIATION,
Plaintiffs,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

ANSWER TO SECOND AMENDED COMPLAINT WITH
AFFIRMATIVE DEFENSES AND COUNTERCLAIM

Defendant answers Plaintiffs' Second Amended Complaint as follows:

RESPONSES

1.

In answer to paragraph 1 of the Second Amended Complaint:

> Defendant is without knowledge of information sufficient to form a belief as to the truth of any of the allegations, including the allegation that Marsha Seiber owns approximately 200 acres of property located in Linn County, Oregon (the "Seiber property"), and therefore Defendant denies all of the allegations.

2.

In answer to paragraph 2 of the Second Amended Complaint:

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies all of the allegations in paragraph 2.

3.

In answer to paragraph 3 of the Second Amended Complaint:

Defendant admits that OAR 629-24-809 was adopted by the State Board of Forestry in 1991. Defendant admits that OAR 629-24-809 was renumbered to OAR 629-665-0210 in 1996 without any changes in text. Defendant denies that OAR 629-665-0210 "requires protection of a 70-acre core area of suitable northern spotted owl habitat encompassing the nest site." Defendant admits that Plaintiffs have correctly quoted OAR 629-665-0210(1)(a). Defendant denies that Plaintiffs have correctly quoted OAR 629-665-0210(2) in that they have deleted one sentence and improperly emphasized one word.

4.

In answer to paragraph 4 of the Second Amended Complaint:

Defendant is without knowledge or information sufficient tot form a belief as to the truth of the allegation that all of the "[t]imber of the kind found on the Property is considered to be suitable nesting habitat for spotted owls" and therefore denies the same. Defendant admits that in 1994 Plaintiffs Alvin and Marsha Seiber submitted an application to harvest timber from approximately 4 acres of the Seiber property.

Defendant admits that in 1994 approximately 40 acres of the Seiber property was identified and inventoried as a northern spotted owl resource site. Defendant denies the remaining allegations of paragraph 4.

5.

In answer to paragraph 5 of the Second Amended Complaint:

Defendant denies that paragraph 5 accurately summarizes Boise Cascade Corporation's allegations and denies the substance of the allegations.

6.

In answer to paragraph 6 of the Second Amended Complaint:

Defendant admits the allegations in the first sentence. Defendant admits that the jury made a finding of fact that Boise Cascade Corporation was required to submit to an occupation of its timber by northern spotted owls. Defendant denies the remaining allegations in paragraph 6.

7.

In answer to paragraph 7 of the Second Amended Complaint:

Defendant admits that Plaintiffs Alvin and Marsha Seiber gave Defendant notice under ORCP 32 H of their intent to bring a class action for Claim One, Claim Two and Counts One and Two of Claim Three if OAR 629-665-0210 was not withdrawn. Defendant denies the remaining allegations in paragraph 7.

8.

In answer to paragraph 8 of the Second Amended Complaint:

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that "[t]he Seibers are members of OSWA" and that many of the "private denies the same. Defendant denies the remaining allegations in paragraph 13.

14.

In answer to paragraph 14 of the Second Amended Complaint:

Defendant denies all the allegations in paragraph 14.

15.

In answer to paragraph 15 of the Second Amended Complaint:

Defendant admits that on or about February 4, 1998, Plaintiffs Alvin and Marsha Seiber notified the State Forester of their intent to harvest timber from approximately 42 acres (the "project site") of the Seiber property. Plaintiffs Alvin and Marsha Seiber submitted a written plan to the State Forester on or about February 9, 1998 (the "Plaintiffs Alvin and Marsha Seiber's written plan"). Defendant admits that on or about February 19, 1998, the State Forester refused to approve Plaintiffs Alvin and Marsha Seiber's written plan. Defendant denies the remaining allegations in paragraph 15.

16.

In answer to paragraph 2 of the Second Amended Complaint:

Defendant admits that Plaintiffs Alvin and Marsha Seiber made a timely appeal of the State Forester's

decision to the State Board of Forestry. Defendant admits that the State Board of Forestry issued its final order on or about March 27, 1998, and that the order is "final" for judicial review purposes under ORS 183.482. Defendant denies that Plaintiff's summary of the final order is complete and accurate. Defendant denies that Plaintiffs Alvin and Marsha Seiber are prohibited from harvesting timber from the project site on the Seiber property.

17.

In answer to paragraph 17 of the Second Amended Complaint:

Defendant admits that Plaintiffs seek a declaratory judgment that OAR 629-665-0210 effects a taking under the Fifth Amendment to the U.S. Constitution. Defendant denies that the claim is allowed under ORS 28.010 *et seq.* Defendant denies the remaining allegations in paragraph 17.

18.

In answer to paragraph 18 of the Second Amended Complaint:

Defendant responds as it responded in paragraphs 1 through 16 of this Answer.

19.

In answer to paragraph 19 of the Second Amended Complaint:

Defendant denies all of the allegations in paragraph 19.

20.

In answer to paragraph 20 of the Second Amended Complaint:

> Defendant admits that it refused to approve Plaintiffs Alvin and Marsha Seiber's February, 1998, written plan to harvest timber from the project site on the Seiber property. Defendant denies Plaintiffs' characterization of the purpose and effect of the refusal. Defendant denies that the refusal effects a taking of property for a public purpose. Defendant admits that Article I, § 18, of the Oregon Constitution requires that the taking of property for a public purpose, if it occurs and then continues State of Oregon all rights and opportunities necessary and customary for possession and use of the property; and

5. Any further relief that the Court determines is appropriate.

DATED this 2nd day of September, 1998.

Respectfully submitted,

DAVID SCHUMAN
Deputy Attorney General

/s/ Lore Bensel
LORE BENSEL #89164
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APPENDIX N

Page vii:

Executive Summary

of the Northern Spotted Owl
Recovery Plan

Introduction

A recovery plan is called for by the Endangered Species Act to guide the management actions needed to bring a threatened or endangered species to a condition in which it no longer needs special protection of the act. The northern spotted owl (also referred to in the recovery plan as the spotted owl and the owl) was placed on the list of threatened species in June 1990. Since February 1991, a Recovery Team appointed by Secretary of the Interior Manuel Lujan Jr. has been formulating a recovery plan for the spotted owl. This report presents a draft recovery plan for the northern spotted owl for review and comment by the public and government agencies.

The northern spotted owl draft recovery plan provides a comprehensive basis for management actions to be undertaken by forest landowners and wildlife agencies to alleviate conditions threatening the species. Primary actions will be taken by federal land management agencies in the Pacific Northwest—the U.S. Forest Service, the U.S. Bureau of Land Management, and the National Park Service. The U.S. Fish and Wildlife Service will oversee implementation of the plan through its authorities under the Endangered Species Act.

State forest management and wildlife agencies in Oregon, Washington, and California also will take actions that contribute to recovery under the plan. These state agencies have an important role in managing state

forests and in regulating forest practices on private land within their jurisdiction. Contributions from habitat on Indian lands also were considered in formulating the draft plan.

The draft recovery plan was developed following review of the scientific data from previous plans for the spotted owl, particularly the conservation strategy designed by the Interagency Scientific Committee (ISC) (Thomas et al. 1990), and by analyzing the most recent data available on owl populations and their habitat. This biological information was the basis for designing measures to achieve recovery.

* * * *

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Secretary of the Interior Lujan also asked that the Recovery Team consider other species and economic effects to the extent allowed by law. The Recovery Team made a substantial effort to determine the status and location of other species that could benefit from actions similar to those needed for owl recovery. Measures that would contribute to recovery of the owl, while also helping other species, were favored in decisions leading to the draft recovery plan.

Previous studies show that protection of sufficient habitat for a viable spotted owl population has substantial economic and social costs because of the reduction in timber harvests. The Recovery Team recognized that, under the Endangered Species Act, it could not consider measures short of achieving recovery for the northern spotted owl, even though such measures might cause significantly less economic and social losses. Instead, the Recovery Team looked for ways to achieve recovery that would cause less reduction in timber harvest and fewer job losses in the timber industry.

Recovery Objective

The objective of the draft recovery plan is to remove the northern spotted owl from the list of threatened species.

The Draft Recovery Plan

The northern spotted owl draft recovery plan has seven key elements:

1. A recovery objective and a set of criteria for determining whether conditions exist that would allow the northern spotted owl to be removed from the list of threatened species.

2. A network of designated conservation areas on federal forestlands, with each area designed to protect owl habitat sufficient to support a number of breeding pairs of owls.

3. A set of guidelines that govern management activities on federal forestlands in designated conservation areas.

4. A set of guidelines that govern management activities on federal forestlands outside of designated conservation areas.

5. A set of suggestions for contributions from nonfederal forestlands to support spotted owl populations.

6. A monitoring and research program that will provide new information on spotted owls and their habitat, and develop and test management techniques for promoting and maintaining owl habitat while allowing appropriate forest management.

7. Implementation mechanisms that provide oversight and coordination, relying primarily on existing authorities and forest management planning procedures.

Each of these elements is described briefly, followed by a discussion of the scientific basis for the plan and of the economic and social considerations built into the plan.

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Delisting Criteria

The primary threat to the northern spotted owl leading to its designation as a threatened species is the reduction and fragmentation of its habitat in forests in Washington, Oregon, and northern California. Northern spotted owls use old-growth forests and other forests with similar characteristics for nesting, breeding, and rearing young. As timber harvesting has proceeded in the Pacific Northwest, the amount of habitat suitable for spotted owls has declined and remaining habitat areas have become smaller and more isolated from each other, particularly during the last 50 years. As a result, the population of spotted owls declined, in some areas rather sharply.

The objective of the draft recovery plan is to reduce the threats to the spotted owl so that it can be removed from the list of threatened species anywhere in its range. The decision to remove the spotted owl from the list of threatened species can be made on an incremental basis for individual areas, called provinces, or for groups of provinces. The range of the spotted owl has been divided into 11 provinces.

Four criteria must be met before delisting is considered: (1) A scientifically credible plan for monitoring owl populations and owl habitat must have been in effect for at least 8 years; (2) the population must have been stable or increasing, as indicated by both density and demographic estimates, for at least 8 years; (3) regulatory mechanisms or land management commitments must

have been implemented that provide for adequate protection of breeding, foraging, and dispersal habitat, and (4) analyses must indicate that the population in unlikely to need protection under the Endangered Species Act during the foreseeable future. The draft recovery plan emphasizes that all of these criteria must be satisfied before delisting is considered.

Designated Conservation Areas

As the primary means for achieving recovery, the draft plan recommends establishing 196 designated conservation areas (DCAs) to provide approximately 7.5 million acres of federal forestland as the primary habitat for the northern spotted owl population. These DCAs include approximately 48 percent of the total remaining spotted owl nesting, roosting, and foraging habitat on federal lands (Figure ES.1.). The largest DCAs are designed to support a population of 20 or more pairs of owls in habitat conditions that allow successful breeding and rearing of young. They are located to allow owls to disperse from one DCA to another. Each DCA contains areas of currently existing owl habitat combined with areas of younger forests. These younger stands will be protected so they can mature into owl habitat. The DCAs contain approximately 1,180 known owl pairs on federal lands. This represents about 48 percent of the total pairs currently known on all federal lands (Figure ES.2.). When the DCAs become fully developed owl habitat, they will support a population of approximately 2,320 pairs of owls.

DCAs are located to take advantage of other forestland containing owl habitat that will not be harvested or will be harvested in a manner that does not reduce habitat value. Such areas include parks, wilderness areas, and certain administratively reserved areas. DCAs also are located in a pattern to reduce the risk to the owl

population from natural threats such as fire, disease, and insects.

* * * *

Page 3:

I.

A. The Northern Spotted Owl and the Endangered Species Act

1. How the Owl Came To Be Protected Under the Act

The U.S. Fish and Wildlife Service (FWS) first considered the possibility of listing the northern spotted owl (also refered to in the recovery plan as the spotted owl and the owl) under the Endangered Species Act in the early 1980s, but concluded that it would have been inappropriate. In 1987, a small organization known as GreenWorld, later joined by other environmental groups, petitioned the FWS to list the owl as endangered. The act's petition provisions required a preliminary finding within 90 days as to whether listing might be warranted. The FWS made a positive finding and initiated a review of the owl's status.

A second finding was required within 12 months of receipt of the petition. The second finding, directed at the question of whether listing was warranted, was more definitive than the 90-day finding. On December 17, 1987, the FWS found listing was not warranted.

The legality of the negative finding was challenged in court by several environmental groups, and the federal District Court in Seattle ruled that the finding appeared not to be supported by the status review that the FWS had conducted (see General Accounting Office 1989 for a review). When a judge ordered the FWS to produce a record that supported its decision, the FWS requested and was granted time to reconsider its finding in light of the most recently available information. In April 1989,

the FWS made a finding that listing was warranted. A proposal to list the owl as a threatened species was published in June 1989, and the owl was listed effective July 23, 1990.

2. The Endangered Species Listing Process

A process for ascertaining which species need attention is basic to any program of species conservation. Section 4 of the Endangered Species Act assigns this task to the Secretaries of the Interior and of Commerce, and operational authority within the two departments is delegated to the FWS and the National Marine Fisheries Service. The responsibilities and authorities for listing under the act are framed very broadly as the determination ". . . whether any species is an endangered species or a threatened species . . . ." Determinations are made by regulation through a proposal-and-comment process. In addition to this broad charge to the federal agencies to assess the status of species, the act provides a process for the public to petition for a species to be listed, and it makes the agencies accountable to petitioners. Some definitions are useful in understanding this assessment phase.

"Species" means any species or subspecies of plant or animal and, in the case of vertebrate life forms, may include any distinct population segment.

"Endangered species" means a species in danger of extinction throughout all or a significant portion of its range.

* * * *

Page 4:

"Threatened species" means a species likely to become endangered in the foreseeable future throughout all or a significant portion of its range.

The Endangered Species Act requires that listing decisions be made "solely on the basis of the best scientific and commercial data . . . ." In this context, "commercial data" refers solely to information regarding trade in a species or products derived from it, and does not allow the probable economic consequences to affect a decision regarding a species' listing.

3. Critical Habitat Designation

The Endangered Species Act also directs the agencies to propose critical habitat "to the maximum extent prudent and determinable." Once again, the act's definitions are important.

> "Critical habitats" are specific areas within the geographical area occupied by a species at the time of listing on which are found those physical or biological features (1) essential to the conservation of the species; (2) which may require special management considerations or protection; and (3) specific areas outside the area occupied by the species upon a determination that such areas are essential to its conservation.
>
> "Conservation" means the use of all methods and procedures necessary to bring a species to the point at which the protective measures of the act are no longer necessary. Conservation is the process or means of achieving recovery. It is reasonable for the designation of critical habitat areas "essential to the conservation of the species" to consider the habitat needs identified in a recovery plan.

Designation of critical habitat is considered to be prudent when it would be of conservation benefit to the species for which it is designated. Critical habitat is determinable if sufficient information is available to adequately delineate the area or areas that should be included in the designation.

The act also requires an examination of the economic and other relevant impacts of the designation of critical habitat, and allows areas to be excluded from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, unless exclusion would lead to the extinction of the species.

In the proposed and final listing of the northern spotted owl, the FWS deferred designation of critical habitat as "not determinable." Critical habitat must be designated to the maximum extent prudent and determinable at the time a species is listed. If critical habitat is not determinable at listing, the act allows an additional year beyond the one in which listing must progress from proposed to final. At the end of the second year, critical habitat must be designated to the maximum extent prudent. In further consideration of the case that challenged the FWS's original petition finding, the court did not accept the FWS's argument that critical habitat for the owl was not determinable, and ordered the FWS to publish a proposal to designate critical habitat by April 29, 1991. A proposal for 11.6 million acres of critical habitat was published on May 6, 1991. A revised proposal that reduced the area to about 8.2 million acres, principally by excluding private, Indian, and state lands, was published on August 3, 1991, and a final designation of 6.9 million acres was issued on January 15, 1992.

* * * *

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Northern goshawks (*Accipiter gentilis*) also prey on adult and juvenile spotted owls (Forsman et al. 1984, Gutierrez et al. 1985, Miller 1989, Johnson 1991 pers. comm.). Nevertheless, spotted owls will nest within a goshawk territory (Forsman et al. 1984) and will defend their young against attacks by goshawks (Gutiérrez

unpub. data). Thus, goshawks probably are not serious threats to spotted owl populations.

Until recently, people rarely have encountered spotted owls and there has been no historic persecution by humans of this docile creature. The recent, conspicuous rise in spotted owl deaths at the hands of humans is a potential threat to local owl populations.

Diseases and Parasites

Disease and parasite infections represent another form of interspecific interaction because it is the relationship (in the broad biological meaning) of one organism with another. However, the topic of pathogens is treated separately here because it is treated separately in status analyses by the FWS when listing a species as threatened or endangered.

Relatively little is known about the diseases and parasites of spotted owls. Gutierrez (1989) conducted an extensive survey of hematozoan parasites (those that live in the blood) among all three subspecies of the spotted owl. Of the six hematozoan species found, all but one species occurred in the northern spotted owl. The infection rate was 100 percent, which was one of the highest rates of infection by these parasites recorded among birds (Greiner et al. 1975). However, spotted owls must be adapted to carry these high parasite loads because their survival rates are very high where infection rates are high (e.g., northwestern California, see following text). Hoberg et al. (1989) examined 20 northern spotted owls for helminth (worm) parasites and found eight species, representing nematodes (round worms), cestodes (flat worms), and acanthocephalans (spiny-headed worms). More than 80 percent of the birds were infected with at least one species; and multiple infections were common. Young et al. (In

Review) reported two hippoboscid fly (louse) species from spotted owls in northwestern California. One species of fly was recorded only once among the 382 owls examined, but approximately 17 percent of the owls they examined were infested by the other species. Fly densities on owls were higher in years of higher summer and fall temperatures and lower winter precipitation. The authors speculated that low temperatures may have depressed survival of fly pupae. Finally, Forsman (pers. comm.) observed two nests where owlets had such high infestations of hippoboscids that the flies caused severe trauma to the young birds.

Habitat

Habitat selection and its context: Perhaps the most controversial aspect of the natural history of the spotted owl concerns its habitat requirements. Thomas et al. (1990:143-144) discussed the complex habitat needs of the northern spotted owl.

Most species exhibit variation in habitat selection (i.e., most species are not strict habitat specialists). Spotted owls are known to use many habitats. Empirical observations of spotted owls in different habitats can provide understanding of the birds' habitat requirements at three different levels (Peek 1986). *Habitat use* is the simple observation of an animal in a habitat without understanding the context of the observation. *Habitat selection* is the choice of a habitat or habitats among those that are directly available to the animal. *Habitat preference* is the selection of habitat that would be made by an animal

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if all habitats were available to the animal. Thus, we have many observations of spotted owl habitat use,

fewer studies of habitat selection, and no studies of habitat preference as defined by Peek (1986). Early studies portray the northern spotted owl as a denizen of primal forests (Grinnell and Miller 1944) based on observations of habitat use. However, Grinnell and Miller (1944) found that geographic variation in habitat use did exist in spotted owls. Subsequent investigations (Forsman 1976, 1980, Solis 1983, Forsman et al. 1984, Gutierrez et al. 1984, Solis and Gutierrez 1990, Sisco 1990, Blakesley et al. In Press, Bart and Forsman 1992) reaffirmed the naturalists' notions from observations of habitat use, but more importantly, provided analyses of habitat selection. Recent surveys of managed (i.e., previously logged private lands) forests have added to the knowledge of habitat use (Diller 1989, Irwin et al. 1989a, 1989b, Kerns 1989, Pious 1989). These latter observations are important, but their ecological significance is enigmatic because, unlike studies conducted on public land, there is no supporting demographic information. It is essential that more demographic information be gathered to evaluate these populations (see section on spotted owl use of young, managed timberlands).

Variation in habitats used: Spotted owls are known to nest, roost, and feed in a wide variety of habitat types and forest stand conditions throughout their distribution (see discussion of suitable habitat elsewhere in this document). Spotted owls use western hemlock, mixed evergreen, mixed conifer, Douglas-fir, redwood, Douglas-fir/hardwood, evergreen hardwood, ponderosa pine, western red cedar, and other forest types in different parts of their range. Most observations of spotted owl habitat use have been made in areas having a component of old-growth and mature forests (Solis 1983, Forsman et al. 1984, LaHaye 1988, Sisco 1990, Ward 1990, Zabel et al. In Prep.; see additional sum-

maries in Thomas et al. 1990). However, observations of spotted owls in managed (i.e., previously logged) stands are commonplace (Diller 1989, Kerns 1989, Pious 1989). Studies evaluating habitat selection show owl selection for mature and/or old forest stands with concomitant selection against young stands (Forsman 1980, Solis 1980, Carey et al. 1990, Blakesley et al. In Press). Selection for forest stands of intermediate age and size vary among the owls studied.

Nesting habitat: Most northern spotted owl nest sites observed on public lands have been located in old-growth or mature forests (Forsman et al. 1984, LaHaye 1988). In addition, the proportion of older seral stage forest surrounding nests has been significantly greater than it was in surrounding random sites in the same area (Meyer et al. 1990, Ripple et al. 1991). In areas of private managed forest, particularly in the California Klamath and California Coast physiographic provinces, where some uneven-aged silviculture has occurred or where fast tree growth facilitates rapid habitat development, spotted owls are known to nest in managed stands, especially if residual old-growth characteristics are present (Forsman et al. 1977, Diller 1989, Pious 1989, Thomas et al. 1990; see Appendix B).

Spotted owls do not build their own nests; they depend upon suitable naturally occurring nest sites. In older-age forests, owls tend to nest in broken-top trees and cavities; they use platforms (i.e., abandoned raptor nests, squirrel nests, mistletoe brooms, debris accumulations) less frequently (Forsman et al. 1984, LaHaye 1988). In younger forests (i.e., forests less than 150 years old), nests more frequently are found on platforms (LaHaye 1988, Irwin et al. 1989a, Buchanan 1991). In one California study (LaHaye 1988), the proportion of platform nests used by spotted owls

increased north to south, but the trend probably is related to the distribution of stand ages in that study rather than latitude.

The presence of suitable nest sites has been hypothesized as one possible basis for the use of old-growth by spotted owls (Forsman et al. 1984). However, owls

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also use a variety of nest sites in younger-aged stands. But one critical piece of information should be assessed before this hypothesis can be tested. That is, the relative nesting success of birds using cavities and broken-top sites should be compared to that of birds using the presumably structurally less stable debris platforms. In any event, artificial nest sites probably could be provided for these birds (Madison and Woodbridge pers. comm.). European owls in the genus *Strix* readily use nest boxes (Southern 1970, Saurola 1989). If spotted owls behave in a similar fashion to other *Strix* owls, the availability of nest sites probably is not a critical management problem. However, a critical study of nest-box acceptance by spotted owls has not been conducted.

Several studies have been conducted on the structure of spotted owl nesting habitat (LaHaye 1988, Buchanan 1991, Self and Nelson 1991 pers. comm.). In the two studies that compared nest sites with available habitat, one in unmanaged forest and the other in managed forest (LaHaye 1988 and Buchanan 1991, respectively), owls nested in forests that differed from what was available to them, suggesting selection by the owls. In general, owls preferentially used forests with greater complexity and structure. Nesting habitat structure reported by Self and Nelson in managed forests (1991 pers. comm.) was strikingly similar to the habitat structure used by

foraging spotted owls in unmanaged stands within the same province (Solis 1983).

Roosting habitat: Northern spotted owl roosting habitat has been described by Forsman (1976), Barrows and Barrows (1978), Forsman (1980), Solis (1983), Forsman et al. (1984), Chavez-Léon (1989), Sisco (1990), and Blakesley et al. (In Press). Roost sites are typically areas of relatively dense vegetation (high canopy closure dominated by large-diameter trees). During the summer these sites are usually cool, shady spots near streams or are on the lower third of slopes (possibly a simple correlation with stream position; Forsman 1976, Solis 1983, Blakesley et al. In Press). Spotted owls respond to variation in temperature and exposure by moving within the canopy to find favorable microclimate conditions (Forsman 1976, Barrows and Barrows 1978, Forsman 1980, Barrows 1981, Solis 1983, Forsman et al. 1984). The multistoried stand structure of roost sites facilitates this movement. Because of this observed behavioral response to variation in temperature, it has been hypothesized that old-growth forests are necessary to spotted owls for them to avoid heat stress (Barrows and Barrows 1978). However, Gutierrez (1985) pointed out that there are other plausible hypotheses to explain the associated owls with old-growth.

Foraging habitat: Of the major spotted owl habitat categories, feeding habitat appears to be the most variable (summarized in Thomas et al. 1990). This is predictable given the highly variable distribution and abundance patterns of the owl's primary prey (Ward 1990). Within a given geographic province, foraging habitat may be more variable than either nesting or roosting habitat. Nevertheless, spotted owl foraging habitat is characterized by high canopy closure and complex structure. Comparisons of habitat among

unmanaged stands used by foraging owls and managed stands occupied by nesting owls shows a surprising concordance of structural habitat features in California (Appendix B).

Solis and Gutierrez (1990) presented evidence that male and female spotted owls may segregate their foraging habitat. The smaller males appeared to be using stands that had higher tree density than were the larger females, which foraged in less dense habitats. Earhart and Johnson (1970) suggested that differential habitat use by male and female owls may occur because the high wing loading of the females would make them less maneuverable than males. However, this probably would be a consequence rather than a cause of reversed sexual dimorphism (Muller 1986, Solis and Gutierrez 1990).

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Douglas-fir stands (less than 50 years old). The nearly simultaneous harvesting of large contiguous blocks of industrial-owned lands has created expanses of relatively young forests that isolate the residual suitable habitat and occupied owl sites. Clear-cutting has been the predominant harvest practice within the province.

Few clusters containing more than three pairs of owls exist north of Highway 126. Here, in the northern two-thirds of the province, individual owl sites are generally separated by 3 to more than 15 miles.

Predation and Competition. Great horned owls and northern spotted owls were surveyed in the central Coast Range in 1990 and 1991. Great horned owls were nearly seven times more numerous than spotted owls (Table 2.5). As great horned owls are key predators on spotted owls, this great relative abundance is of concern. Barred owls are distributed throughout the province and have

been recorded at 46 sites from 1980 to 1991. The goshawk population is very low in the Coast Range.

Province Isolation. The province is connected to the western Cascades province in Oregon through forested lands south of Eugene, and to the Klamath and western Cascades provinces south of Canyonville. These key linkage areas contain BLM and private lands in a checkerboard pattern. Due to past and present timber harvest on federal and intervening state and private lands, habitat is particularly limited. For example, BLM lands within 50 percent of the quarter-townships in this area do not contain owl habitat adequate for dispersal (i.e., do not meet the "50-11-40 rule" as described in Thomas et al. 1990). Therefore, the risk of isolation of the Oregon Coast Range province is high and will increase with additional harvest of habitat.

Historically, there was probably a significant connection between the Oregon Coast Range province and the western Washington lowlands province, with owls crossing the Columbia River. Timber harvest since 1920 likely has eliminated this connection. To increase the likelihood of owl recovery in these provinces, habitat would have to be developed along both sides of the Columbia River to reestablish the connection between these two provinces.

Vulnerability to Natural Disturbance. Extensive fires historically have removed large areas of habitat, although return intervals have been long, and annual risk is fairly low. Because current suitable habitat areas are limited and disconnected, disturbance events could remove key areas.

Western Oregon Cascades

This province lies west of the crest of the Cascade Mountains and extends the length of the state from the

Columbia River to the California border. Habitat extends from the eastern edge of the Willamette Valley upslope to about 5,000 feet, and from the moist, true-fir forest in the north to the dry, mixed conifer-pine-oak woodlands in the south. Ownership in this province is 54 percent Forest Service, 34 percent private, 10 percent BLM, and 2 percent state (Figure 2.5a).

Low Populations. Owl populations within this province are moderately high, as is the amount of remaining habitat on federal lands. Areas with low owl numbers occur on 1) private lands, 2) checkerboard BLM lands at lower elevations, 3) checkerboard Forest Service lands in the Santiam Pass area, and 4) higher elevation forests near the Cascade Crest. There are approximately 925 known spotted owl pair sites in this province. Owl use of habitats above 5,000 feet elevation is very limited and few pairs successfully nest above 4,500 feet in this province.

* * * *

APPENDIX O

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Oregon Fish and Wildlife Office
2600 S.E. 98th Avenue, Suite 100
Portland, Oregon 97266
(503) 231-6179 FAX: (503) 231-6195

Reply To: 8539.4001(00)
TS Number: 02-5729 June 3, 2002

Phillip D. Chadsey
Stoel Rives
Standard Insurance Center
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268

Dear Mr. Chadsey:

At the court's direction, we have been working to develop alternatives for Alvin and Marsha Seiber to consider in the development of a habitat conservation plan (HCP) to address the possibility of incidental take of the northern spotted owl. We appreciated the opportunity to visit the Seiber's property on April 21, 2002, and talk with Marsha Seiber and Jerry Whaley, who assists with managing the property. The visit was helpful in evaluating the changes that had occurred to the property since the original incidental take permit application was received November 26, 1999, and since U.S. Fish and Wildlife Service (Service) representatives last visited the property on January 25, 2000. The site visit provided new information as to the current forest conditions.

As you know, the recent history of the Little Wiley Creek spotted owl site has shown that a pair was last observed in 1996. There were no spotted owls observed during surveys in 1997-98, but a male was observed in the vicinity in 1999 and

2000. There were no observations of spotted owls in 2001 and in the two survey visits conducted this year there have been no detections.

Briefly, during our recent site visit we learned that a storm with high winds in early February 2002, had blown down or uprooted many trees in the 40 acre area at issue. Mrs. Seiber indicated that this storm event revealed a greater than previously recognized presence of laminated root rot, a fungal disease that affects the roots of certain tree species. Both healthy and diseased trees were subject to windthrow or partially uprooted. In some cases the falling of trees damaged or knocked down additional trees creating scattered openings. These openings may increase the risk of future windthrow. We also learned that the Seibers are in the process of cutting about 25 acres of timber southwest of the subject 40 acres and have recently completed harvesting about 15 acres, leaving little suitable habitat in that area.

This latest information on the extent of the root rot and the windthrow problems likey affects the ability of owls to utilize the area in the near future. The current openings due to these natural processes have degraded the habitat suitability of the stand for spotted owls. These openings also increase the possibility of future blowdown. In addition, the recent harvest by the Seibers has further limited the amount of interior forest conditions in the immediate vicinity of the 40 acres. The forest area surrounding the Little Wiley Creek spotted owl activity center is highly fragmented and has continued to experience timber harvest since the Seibers submitted their HCP. These new landscape conditions in and around the Little Wiley Creek activity center will likely discourage spotted owl nesting, though not necessarily preclude it.

One additional factor that can affect spotted owl use of the area is the presence of barred owls, which often displace spotted owls when they move into an area. Because spotted

owls and barred owls are closely related they consider each other as competitors for the same resources. In addition, barred owls are more aggressive than spotted owls and are most likely to prevail in any territorial dispute. The presence of individual barred owls in the vicinity of the Little Wiley Creek site has been documented for the past few years. However, recent survey on the evening of May 29, 2002, documented the presence of a pair of barred owls about one mile northwest of the Seiber property. Pairs of owls are generally more territorial than individuals, especially if they are engaged in nesting activities. No other owls were observed during this particular survey.

Considering this new information, especially the presence of a pair of barred owls, we believe that it is unlikely that spotted owls would continue to occupy the area. The reduction of forested area, the fragmentation of forest stands, and the newly discovered presence of a pair of barred owls would deter spotted owls from using the area. This, combined with the intermittent presence of an unpaired spotted owl, suggest that the area will no longer be likely to attract and maintain spotted owls. For these reasons, we believe that the planned activities by the Seibers are not likely to result in a take of spotted owls under the Endangered Species Act at this time, and therefore a section 10 incidental take permit is no longer required.

If you have any questions, please contact Richard Szlemp at (503) 231-6179.

Sincerely,

/s/ Kemper M. McMaster
KEMPER M. MCMASTER
State Supervisor

cc. Dorothy R. Burakreis
Diane K. Hoobler

APPENDIX P

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

Clatsop County Circuit
Court No. 93-2018
CA A115966

BOISE CASCADE CORPORATION,
a Delaware corporation,
Plaintiff-Appellant,

v.

STATE OF OREGON, by and through
THE STATE BOARD OF FORESTRY,
Defendant-Respondent.

MOTION TO RECONSIDER COURT'S PRIOR OPINION IN THIS CASE BASED UPON A RECENT U.S. SUPREME COURT DECISION THAT IS CONTROLLING, WHICH OVERRULES THIS COURT'S EARLIER DICTUM

Based upon the U.S. Supreme Court's recent opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 US ___, 122 S Ct 1465, ___ L Ed ___ 2002, decided April 23, 2002, plaintiff-appellant moves the court to reconsider its earlier opinion in this case stating that plaintiff could not base its takings claim on a physical occupation theory. *Boise Cascade Corp. v. Board of Forestry*, 164 Or App 114, 125-26, 991 P 2d 563 (1999). In *Tahoe-Sierra*, the Court, indicated that physical takings are "easily identified," and went on in footnote 19 to define the

differences between a physical taking and a regulatory taking. *Id.* at 1479. A physical taking involves the landowner's right to exclude others from its property and the use of the property for a public purpose. *Id.* "*A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.*" *Id.* (emphasis added). Since this case involves plaintiff's right to exclude spotted owls from its property by prohibiting the logging of their habitat and the government's claimed right to use plaintiff's timber for the public purpose of providing nesting habitat, plaintiff's claim should clearly be analyzed as a physical taking and not as a regulatory taking as this court stated in its 1999 opinion. 164 Or App at 126. A unanimous jury in this case found a physical taking because plaintiff had been required to submit to an occupation of its property by a pair of northern spotted owls. *Id.* at 117. Plaintiff, under the subject regulation, was prohibited from doing anything that would cause the birds to "flush," or otherwise exclude them, so that the timber could be used for the public purpose of providing nesting habitat for the owls. OAR 629-665-0210(1)(a)-(b).

This court is of course bound to apply the decisions of the U.S. Supreme Court involving the Fifth Amendment's Takings Clause as to all cases currently pending before it. Because this court erroneously decided the physical takings issue in the earlier appeal, and the U.S. Supreme Court has subsequently made clear that this court's prior opinion was in error, this court must overrule its earlier dictum concerning plaintiff's physical takings claim. *Blanchard v. Kaiser Foundation Health Plan*, 136 Or App 466, 470, 901 P2d 943 *rev den* 322 Or 362 (1995); *see also Greene v. Rothschild*, 414 P2d 1013, 1016 (Wash 1966).

DATED: May 28, 2002.

/s/ Philip D. Chadsey

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APPENDIX Q

IN THE SUPREME COURT OF THE STATE OF OREGON

Linn County Circuit Court No. 980649
CA No. A108914
SC S49348

MARSHA SEIBER and ALVIN SEIBER,
Plaintiffs-Appellants/
Petitioners on Review,

and

OREGON SMALL WOODLANDS ASSOCIATION,
Plaintiff,

v.

STATE OF OREGON, by and through THE OREGON STATE BOARD OF FORESTRY,
Defendant-Appellant/
Respondent on Review,

and

AUDUBON SOCIETY OF PORTLAND, OREGON TROUT, INC., PACIFIC COAST FEDERATION OF FISHERIES AND INSTITUTE FOR FISHERIES RESOURCES,
Intervenors-below.

PETITIONERS ON REVIEW'S MOTION FOR LEAVE TO FILE MEMORANDUM OF ADDITIONAL AUTHORITIES

Petition on Review the Decision of the Court of Appeals

On Appeal from the Judgment of the
Linn County Circuit Court

The Honorable Daniel R. Murphy, Judge
Affirmed Without Opinion December 5, 2001
Edmunds, P.J.; Armstrong, Kistler, JJ.

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Of Counsel for Intervenors-Below Audubon Society of Portland, Salem Audubon Society, Oregon Trout, Inc., Pacific Coast Federation of Fisherman's Association, and the Institute for Fisheries Resources

Pursuant to ORAP 5.85(2), plaintiffs Marsha and Alvin Seiber move the court for leave to file a memorandum of additional authorities in support of their Petition for Review.

On April 23, 2002, the U.S. Supreme Court decided *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, ___ US ___, 122 S Ct 1465, __ L Ed 2d ___ (2002). Footnote 19 of the Court's Opinion describes the difference between a physical occupation taking and a regulatory taking. A physical taking involves the owner's right to exclude others and the government's use of the property for a public purpose. On the other hand, "A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others."

Respectfully submitted this 23rd day of May, 2002.

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on Review

APPENDIX R

BEFORE THE BOARD OF FORESTRY
OF THE STATE OF OREGON

Notification 98-791-40082

In the Matter of the Denial
of a Written Plan submitted by

Alvin and Marsha Seiber

FINAL ORDER

History of the Case: A written plan to conduct a forest operation was submitted to the State Forester, Oregon Department of Forestry, on February 4, 1998. On February 19, 1998, the State Forester, through his authorized representative, denied the plan, indicating it was in conflict with OAR 629-665 210(1), because it failed to address how the operation would provide for a 70 acre area of suitable spotted owl habitat. The Order further provided that exceptions to the protection of the nesting site may be approved if the operator obtained an incidental take permit from the federal authorities under the Endangered Species Act. On February 25, 1998, the landowners, through counsel, submitted a "Notice of Appeal", setting forth the reason for the appeal. A hearing was to be conducted on March 12, 1998, in Salem, Oregon. A Notice of Hearing was mailed setting that date. On March 12, 1998, a pre-hearing conference was conducted with Phil Chadsey, counsel for the landowner; and Richard Whitman and Celeste Doyle of the office of the Attorney General. A hearing was set for March 23, 1998, at which time parties were informed of their opportunity to present evidence and witnesses.

On March 23, 1998, a hearing was conducted in Salem, Oregon. The same aforementioned attorneys appeared. Mr. Whitman presented documents and witnesses. Mr. Chadsey failed to present any evidence or witnesses, but did make objections to evidence and question the witnesses presented by the Department of Forestry. The record closed. After that time, the Assistant Attorney General submitted a closing memorandum. It was not considered in the issuance of this final order, as the record had closed, and there had been no indication at the time of the hearing that the State wished to submit additional briefs.

Legal Issue: Should the written plan submitted February 4, 1998, have been denied under OAR 629-665-210?

Findings of Fact: (1) Alvin and Marsha Seiber own 196.19 acres of land located in Section 8, Township 14 South, Range 2, East, W.M., in Linn County, Oregon. (2) The County assessor valued the property at a real market value of $369,570 for the 1997 tax year, with $167,700 attributed to improvements. (3) The Seibers live on the subject property, in the "improvement", their home, which was built in 1988. There is also an out-building and an old bar in disrepair. (4) The property has an open range designation, which would allow livestock grazing. (5) The property abutting the subject property is owned by a timber company. (6) In 1990, the federal government listed the Northern Spotted Owl as an endangered and protected species. (7) The timber company began surveying the property for the Northern Spotted Owl in 1991. (8) In 1991, a pair of Northern Spotted Owls were banded, and there were over a dozen "responses" by the owls that spring and summer. (9) In 1992, there were four "responses" from the pair, which had been identified as the Little Wiley pair.

(10) Nesting behavior was observed and the activity center of the pair was located. (11) In 1993, the pair provided five responses. (12) In 1994, the pair showed signs of nesting,

and the center of activity was moved from the previous location. (13) In 1995, although the pair was sighted, there was no apparent nesting activity. (14) In 1996, the pair was sighted only once, and again did not exhibit nesting behavior. (15) In 1997, no responses were obtained from the pair. (16) Sightings usually occur in the spring and summer months.

(17) In January, 1996, a Notification of Operation near the Little Wiley nesting site was received by the Oregon Department of Forestry, to log the Seiber's land. (18) The nesting site was located near the land ownership boundary between the Seibers and the timber company. (19) After reviewing the sighting records, and meeting with the property owners, a 70-acre area of suitable owl habitat was marked. That area had the appropriate characteristics for habitat. (20) The US Fish and Wildlife Service had developed guidelines for reducing the risk of harm to the species, by suggesting that at least 70 acres of the best available suitable habitat encompassing the activity center be protected. (21) Critical nesting periods for the species are between March 1, and September 30, of each year. (22) In January, 1996, the Department met with both of the subject landowners, and established a 70-acre area surrounding the activity center, listing that site as a protected resource area. (23) The Seibers owned 41 of the subject acres. (24) The stand contained predominately Douglas fir and western hemlock, with lesser amounts of other species. (25) It has an appropriate canopy closure and sufficient open air space below the canopy, but there are fewer over story trees or snags to be considered optimal for spotted owl habitat. (26) Owls in poor habitat nest only once every five years, while optimum conditions allow nesting four out of five years. (27) In 1994, the Seibers logged four acres. (28) In 1996 the Seibers submitted a Notification of Operation which included a written plan to protect the spotted owl site, which was approved. They harvested 10 acres of the property. (29) On February 4, 1998, Jerry Whaley, submitted a Notification of Operation to

conduct a logging operation September 1, 1998, to log the 41 acres contained in the resource area.

(30) The operation was not allowed to commence until a written plan was submitted addressing both the resource site and the fish bear streams. (31) The plan called for clear cutting the 41 acres. (32) The Seibers were identified as both the land owners and the timber owners, and there is no evidence that they have entered into any contracts to sell the timber. (32) A "written plan" was submitted, addressing the fish bearing streams. (33) The plan also indicated that, " No operatations (sic) will be conducted during the critical period of use- March 1 to September 1998 or until the young owls fledge whichever date occurs first. Because the Seibers will not log in the area while the spotted owls are present, none of the owls will be harassed, harmed, taken or killed in violation of any state or federal law." (34) On February 19, 1998, the State Forester denied the written plan submitted on February 4, 1998 because it was in conflict with the protection of the Northern spotted Owl nesting site, and does not address how the operation would be conducted to provide for a 70-acre area of suitable spotted owl habitat. (35) The Order also provided that "exceptions to protection of the northern Spotted Owl nesting site may only be approved by the State forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act. (36) The landowners have not applied for an incidental take permit.

(37) If the owls are not found to be in the nesting site for three consecutive years, the Department of Forestry will remove no longer carry that site on its "protected resource" site list. (38) If the owls are found to be nesting in another area, the Department of Forestry will immediately remove the "protected resource" classification from the site.

(39) The Seibers have another 85 acres of "forested" property on their parcel. (40) On February 25, 1998, the State Forester

was sent a notice of appeal from the attorney for Marsha and Alvin Seiber, stating that the Seibers are willing not to have the timber logged during the nesting season, if northern spotted owl are present in the core area this summer, but that once the season is over they want to log the timber within the core area. (41) The letter continued, "They are tired of the State of Oregon using their property as a public wildlife reserve to their detriment. The Seibers are retired and they need the income from their timber in order to enjoy their retirement. As you are aware a unanimous jury in the case of *Boise Cascade Corp. v. State of Oregon*, Clatsop County Circuit Court No. 93-2018, found that the subject regulation required timber owners within a 70-acre nesting site to submit to a physical occupation of their property entitling them to just compensation under the Fifth Amendment to the US Constitution, for the loss of use of their timber. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 102 S. Ct. 3164, 73 L ED 2nd 868 (1982)." "The court also found that the regulation works a taking because a property owner is denied all economic productive use of the timber that cannot be logged. *Lucas v. South Carolina*, 505 US 1003, 112 S Ct 2886, 120 L Ed 2nd 798 (1992). Under the rules of issue preclusion (collateral estoppel), those findings by the court and jury will be binding in any future litigation brought by property owners against the State seeking compensation on account of being barred from logging because of OAR 629-665-0210. *State Farm Fire & Cas v. Reuter*, 299 Or 155, 158-59, 700 P2d 236 (1985). A regulation that works a taking under the Fifth Amendment is also void and unenforceable under Oregon law. *GTE Northwest, Inc. v. Public Utility Commission*, 3211 Or 458, 900 P2d 495 (1995). The Oregon Department of Forestry should consider this letter to be notice under ORCP 32(H(1)(b) as a demand that the Board of Forestry withdraw the foregoing regulation within the next 30 days. If it does not, my clients waive any

hearing before the BOF and request that it issue a final order in this matter as soon as possible."

(42) Mr. Chadsey was sent a Notice of Hearing, with a Notice of Contested Case Rights and Procedures, and by letter dated March 6, 1998, he indicated that he was willing to waive a right to a hearing so that a final order could be entered by the Board at the next meeting. (43) On March 11, 1998, Mr. Chadsey wrote to the Assistant Attorney General indicating that his clients admit that they have not complied with the requirements of the administrative rule by failing to address how the 70-acre core area will be protected. He suggested it would be a waste of time to hold a hearing, and argued that only a court has the authority to hear the Seiber's federal constitutional takings claims. He further stated that it would violate their right to due process to have the Board of Forestry consider whether its own conduct in a prior proceeding, which both a court and jury have found to have been unconstitutional, is binding upon it in this proceeding based on the ex parte legal advice form counsel that is also representing the Department of Forestry. *Morgan v. United States*, 304 US 1, 58 S Ct 773, 82 L Ed 1129(1938). (44) On March 11, 1998, he was sent documents which would be offered by the Attorney General's office at the hearing. (45) On March 13, 1998, the Board of Forestry delegated the authority to issue a final order to the Administrative Law Judge in this case.

DISCUSSION

Jurisdiction

Counsel for the landowners makes a variety of arguments, in an apparent attempt to avoid the takings issue being resolved by the Board, or this Administrative Law Judge. First, there was argument that because this administrative law judge (ALJ) presided over one of the Boise Cascade administrative hearings, she is somehow prejudiced in this case. Mr. Chadsey argues that the ALJ was reversed, and this

would somehow bias her. He was offered an opportunity to provide any specific evidence of bias. Furthermore, he has failed to demonstrate how a decision in a previous case, which involved a different landowner, and which did not address the issue of whether a "taking" had occurred. In fact, both the Court of Appeals and the Oregon Supreme Court affirmed the Board determinations issued in Boise Cascade. See *Boise Cascade Corporation v. Board of Forestry*, 325 Or 203, ___ P2d ___ (1997). Because he has failed to demonstrate any bias on the part of the fact finder, his objections are without merit.

Mr. Chadsey argues that the issue of a taking has not been raised, and is not properly before this tribunal. His argument is not consistent with his prior pleadings. He requested a hearing specifically alleging that there was issue preclusion preventing the Department from asserting that there was no taking. In that request for hearing, Mr. Chadsey placed the constitutional issues squarely in this forum. He cannot now characterize his request for appeal as anything other than what it is, a direct challenge on the validity of the regulation. His challenge clearly is on a constitutional basis, based on both the cases he cited, and the clear meaning of his words. Based on the arguments presented by Mr. Chadsey, both the state and federal constitutional challenges have been proffered. OAR 629-55-110 which provides for the procedure in requesting a hearing from a denial of a written plan provides that the request for hearing must include a "specific statement as to the reasons for disputing the State Forester's order, including but not limited to disagreement with any findings leading to the order. In addition, the request for hearing shall state what relief from the order is sought". In this case, Mr. Chadsey apparently sought rescission of the administrative rule. He argues that the rule causes an unconstitutional taking, and implies that it must therefore be withdrawn. The issue is ripe for adjudication.

Counsel also argues that this forum has no jurisdiction to consider the federal takings issues on two grounds. Firstly, he contends that the circuit court case precludes the Department from asserting that the rule is constitutional. It must be noted that although this argument was raised, neither party to this proceeding provided any evidence of the findings made, or the final results reached in the Boise Cascade case. A Circuit Court determination is not a decision of record. Additionally, it cannot be assumed that the interpretation given by any attorney is necessary shared by others. the burden is on the party asserting collateral estoppel to prove the elements. The correct procedure would be to place into evidence the prior judgment and the appropriate portions of the record. *See Koos v. Roth*, 43 Or App 383, 602 P2d 1128 (1979) Without such evidence, the arguments averred by counsel about collateral estoppel are unsupported.

However, even if there was evidence of the trial court ruling, it would not necessarily preclude this adjudication. A rule can be found to be invalid as it is applied to a particular set of circumstances, while generally a valid exercise of the state's police power. In *United States v. Mendoza*, 464 US 154, 104 S Ct 568 (1984) the United States Supreme Court did not allow collateral estoppel to be applied against the federal government where a Filipino national had been denied the right naturalization. In that case, the petitioner had argued that others under similar circumstances had been granted naturalization by the U.S. District Court upon a finding that the Government had not provided sufficient justification for failing to station an INS representative in the Philippines during all of the relevant periods. The Court discussed in length the difference between suits involving the government and those between private parties, and held that, at least in the federal context, nonmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues. In *Norgard v. Rawlinson*, 30 Or App 999, 569 P2d 49 (1977), the Court of Appeals

refused to allow this "offensive collateral estoppel" by a non-party to the first proceeding, by explaining that the "existence of over 30 circuit courts in this state made it a practical impossibility for the [Worker's Compensation] Board to be bound by any particular decision of a circuit court." The analysis in Norgard is applicable here. Any determination by a circuit court about whether there was a taking would clearly be fact specific. It cannot be applied to another case, involving another property, or other parties. Issue preclusion is not applicable in this case. Counsel then argues that this forum has no jurisdiction to address the takings issue. In *Boise Cascade*, 325 Or 185, ___P2d ___(1997), the landowners had been denied a written plan because of its failure to address the northern spotted owl resource site on the property. At the two separate administrative hearings related to separate parcels, the landowner had raised the issue of whether there had been a taking, under both state and federal constitutional law. The Board of Forestry rejected the argument stating that the landowner failed to present evidence of any taking at the one hearing. At the second hearing, the issue of a "taking" was deferred. Subsequently, the landowner filed an inverse condemnation action in Clatsop County Circuit Court, alleging a "taking" under both the Oregon Constitution and the United States Constitution. The State moved for dismissal of those actions, and the matter came to the Oregon Supreme Court on the issue of whether the case should have been dismissed for lack of jurisdiction. The State had argued that the Board of Forestry had primary jurisdiction to make a determination in the matter. The Oregon Supreme Court held that the circuit court was not precluded from exercising jurisdiction. However, in its companion case, at 325 Or 203, the Court concluded that the Board has jurisdiction to make a determination as to whether a "taking" had been effected. The Board and the Circuit Court have concurrent jurisdiction to decide "takings" issues.

In *Dodd v. Hood River County*, ___ F3d__; 1998 WL 57497 (9th Cir 1998), the Ninth Circuit Court of Appeals addressed zoning regulations and the "takings" clause. In that case, the Dodd's purchased forest land property with the hope to build a homesite. At the time, state law limited whether a dwelling could be placed on the property, but the county ordinances were not in compatible with the state law, and might have allowed development at that time. After the property was purchased, the county passed ordinances to comply with the statewide goals. Several years later the landowners applied for permits to build a residence on the property. It was denied, and the Dodd's appealed to the Land Use Board of Appeals (LUBA), arguing a taking under only the Oregon Constitution. They specifically reserved their takings claim under the federal Constitution. LUBA concluded that there was no taking under the Oregon Constitution because the land could "produce a net profit if properly managed, and therefore, the Dodds were not denied a "substantial beneficial use of the property." That determination was affirmed by the Court of Appeals and the Oregon Supreme Court. The Dodd's then filed suit in federal court. The State argued that the issue of whether there was a substantial beneficial use of the property had been previously litigated, and could not be relitigated in the federal forum. The Ninth Circuit concluded that the Dodds had a full and fair opportunity to present all relevant evidence at the first hearing, and their failure to avail themselves of that opportunity should not allow them to have a "second bite at the apple." The analysis used in the Oregon forums was the same as used in U.S. Supreme Court cases, under *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct. 2886 (1992).

Implicit in the discussion in Dodd is the proposition that a state agency has the authority to rule on federal constitutional questions. Clearly, an agency has the authority to invalidate one of its own rules on Constitutional grounds. That is precisely the remedy sought by these landowners. Both the

Oregon Courts and the Ninth Circuit agree with that proposition. The Board has the authority to rule on both state and federal constitutional issues, including the issue of whether there has been a taking.

Finally, there is an assertion that under *Morgan v. United States*, 304 U.S. 1, 58 S. Ct 773 (1938), there is some failure of due process in having the Board of Forestry issue a determination in this case. In *Morgan*, the Secretary of Agriculture fixed maximum rates to be charged by market agencies at the Kansas City Stockyards. Challenges to the Department's authority were made. The Secretary of Agriculture had singed findings made by the Bureau of Animal Industry after a hearing had been conducted. Exhibits were received and oral evidence and argument heard. The appellants had requested an opportunity to submit exceptions and argument to the Secretary, but the request was refused. The Court stated that the right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. No such opportunity had been provided to the appellants in Morgan, as the government had failed to present sufficient information as to its position to allow for a reasoned response.

Morgan has no application here. Counsel for the landowners asked for an opportunity to see the Department of Forestry's legal arguments prior to the hearing. Arrangement were made to accommodate this. At the hearing, they were given the opportunity to submit additional briefing on any issues raised at that time. Despite these opportunities, the landowners opted not to submit further argument, or to even provide any evidence. The performance of a quasi-judicial function by an administrative agency is of the highest importance, and does not cripple or embarrass the exercise of its authority. It is in the agency's own interest to ensure a full and fair hearing. That has been done in this case. The

landowner's refusal to avail themselves of the opportunity does not make an otherwise fair process unfair.

Application of Rules

ORS 527.710 requires that the Board of Forestry adopt rules establishing forest practice standards throughout the state, assuring the continuous growing and harvesting of forest tree species, and providing for the overall maintenance of fish and wildlife. The statute also requires the board to establish inventories of resource sites needing protection, including species listed under the Endangered Species Act of 1973, as amended and sensitive bird nesting sites. The board is required to adopt rules appropriate to protecting the resource sites in the inventories.

Pursuant to the legislative mandate, the Board of Forestry has adopted administrative rules. OAR 629-605-0150 requires an operator, landowner or timber owner to notify the State Forester at least 15 days before commencing an operation. OAR 629-605-1070 requires that the operator, landowner or timber owner submit a written plan prior to conducting an operation if the operation is within 100 feet of fish-bearing stream, or within 300 feet of any nesting or roosting site of a threatened or endangered species. OAR 629-605-0180(1)(c) provides:

> If planned forest practices are determined to conflict with protection of the sensitive resource site, the written plan shall describe reasonable measures sufficient to resolve the conflict in favor of the resource site. Reasonable measures to resolve the conflict in favor of the resource site may include but are not limited to preparing and implementing a habitat management plan, limiting the timing of forest practices, redesigning the proposed practices in favor of site protection and excluding the forest activities outright.

OAR 629-665-0210 provides, in part:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl, the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> (a) A 70 acre area of suitable spotted owl habitat encompassing the next site, to be maintained as suitable spotted owl habitat.
>
> (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1, and September 30, each year.
>
> (2) For purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State Forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.
>
> (3)(a) For purposes of this rule, suitable spotted owl habitat means and includes: (A) A stand of trees with moderate to high canopy closure (60 to 80%); a multi-layered, multi-species canopy dominated by large overstory trees; a high incidence of large trees with various deformities; numerous large snags; large accumulations of fallen tress and other woody debris on

the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximately the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed paragraph (a)(A) of this section are not suitable habitat.....

* * * *

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the state Forester if the operator has obtained an incidental take permit from the federal authorities under the federal Endangered Species Act.

The Seibers submitted a notification to operate in an area which had been determined to be a protected resource because of the northern spotted owl pair sighted in that area since the beginning of surveying for such species. The area designated as the resource site exhibits at least two of the characteristics listed in the administrative rule. The landowners failed to provide for any protection of the resource site, except they agreed not to log the area during the nesting season. They do not contest the accuracy of the characterization of the site. the State has presented evidence to support the finding that there have been northern spotted owls nesting on the site, and that the designated 70 acre area is appropriate for protecting the resource. The landowners have failed to seek an exception under the administrative rule. Clearly, the agency acted appropriate under its own rules in denying the written plan.

Taking—Federal

The Fifth Amendment of the Constitution of the United States provides that "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"

Counsel for the landowners in this case have failed to make any bona fide effort to present evidence as to whether there has been a taking; whether the alleged taking is one of real or personal property; whether this "taking" would be one which is considered a "physical invasion"; or whether it is their contention that there is no value to the land with the regulation imposed by the State.

In fact, they have refused to avail themselves of any of the opportunities for a fair hearing on those issues because they argue that the Board lacks the authority to rule on the issues. As has been discussed above, the Board has authority to address the issues, and they have been fully raised in this forum.

It would appear that the "strategy" of the landowner is to prevent a full and fair inquiry at this level, so there would not be a foreclosure of some future right to litigate. However, having raised the issue, and given the *opportunity* to present both testimony and legal argument, the landowner is entitled to a determination as to whether there has been a taking. The landowner has requested an appeal of the denial of the written plan. If they did not wish to have a hearing, they could have allowed the denial to stand with appealing it, or they could have withdrawn the appeal. They did neither because to do either would have been a failure to exhaust administrative remedies, and probably bar further actions in other forums.

In the Notice of Appeal, the landowners cited two U.S. Supreme Court cases , *Loretto* and *Lucas*, both cited above. *Loretto* related to a permanent physical occupation of property, and the Court held that even a small permanent

occupation was a per se "taking", and required just compensation. In *Lucas*, the Court held that where the State seeks to sustain regulation that deprives land of all economically beneficial use, it must pay just compensation. "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking". Citing *Pennsylvania Coal Co. V. Mahon*, 260 U.S. 393, 43 S Ct. 158 (1922). In *Lucas*, the Court held that the Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests, or denies an owner economically viable use of his land. In that case, a landowner, who had purchased two parcels of beachfront property was denied any right to erect a habitable structure on the property, when the land use laws changed to prohibit building on land so close to the beach "erosion zone". The state trial court found that this prohibition rendered the parcels "valueless".

Clearly, the case at hand is not in the nature of a physical occupation of the property. The State has no interest in having use of the property. They simply wish to limit the uses of the 41 acres *so long as* there is evidence of northern spotted owls using the area for nesting. The government effects a physical taking only where it requires the landowner to submit to physical occupation of his land. *Yee v. City of Escondido, Cal*, 503 U.S. 519, 112 S. Ct. 1522 (1992). As a factual matter, this landowner loses neither the right to possess nor to convey the affected areas. They are permitted to use the property in any way which does not disturb the owl's habitat, and that limitation will only continue so long as the pair remain in that area. In fact, under these circumstances, the limitation could be lifted within months, if the owls are found to have created a new resource site through nesting activities. It could be lifted within a year, if there are no sightings of the pair during this critical period,

and the next. It could be lifted if the landowners were to obtain an incidental taking permit ~~from~~ the federal government.

The U.S. Supreme Court has consistently held that the unit of property for purposes of determining whether a taking has occurred is the owner's full bundle of property rights. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978). In that case, the Court said that, "the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. . . . . "taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."

The Seibers own 196 acres of land in one tax lot. That property contains other areas which can be harvested for timber, some buildings, including a homesite with substantial value. The fact that the denial of the written plan prevents the Seibers from pursuing *one* use of the property for a temporary, but indefinite, period of time, does not mean that it constitutes a taking. The entire property is to be considered. See *MacLeod v. County of Santa Clara*, 749 F.2d 541 (9th Cir. 1984). In *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S. Ct 987 (1962), a city ordinance prevented a landowner from excavating 20 of his 38 acre lot. The Court took into consideration the availability of the remaining 18 acres of land in determining that the ordinance did not constitute a taking. The landowners retain the right to enjoy the property, as well as any appreciation which might occur; to sell the timber rights, subject to the state and federal protections, to continue to hold this property as an investment, and to use the property for a variety of otherwise acceptable purposes. There was no evidence presented that the property has been made "valueless", by this denial, as

required in *Lucas*. In fact, the landowners refused to provide any evidence whatsoever, and objected to the admission of evidence related to the property as irrelevant. Because of this, it cannot be contended that they have raised an argument that there has been any diminution of value. [although diminution of value, standing alone, cannot establish a taking. See *Penn Central*, supra, and *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct.114 (1926)]

In *Florida Game and Fish Com'n v. Flotilla*, 636 So.2d 761, (Fla App. 2 Dist 1994), a developer brought a per se *Loretto* claim when a Florida state regulation prohibited further development within 750 feet of a bald eagle nesting tree. The Court found no physical occupation and no taking. In that case, the landowner held 173 acres, and had been developing it in phases. A trial court found that 48 acres had been "taken" for habitat preserve. The appellate court reversed this, finding no taking simply because those 48 acres were subject to regulation. The property *as a whole* retained an economic life. The trial court had found that the Commission had "empowered the eagles to decide which land would be taken". The court held that the government neither owns nor controls the migration of the wildlife species it protects. Rather, the government merely employs it police power to "conserve and protect these species as a natural resource". Unwanted occupation of wildlife on private land may diminish the value of the property, but does not constitute a "taking". See *Christy v. Hodel*, 857 F.2d 1324

The landowner has failed to show that under any federal analysis the denial of the written plan was a "taking".

Taking—State

The Oregon Constitution, Article 1, Section 18 provides "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just

compensation; nor except in the case of the state, without such compensation first assessed and tendered."

Government action may result in a "taking" under the Oregon Constitution when the governmental action creates an expectation that the private land in question will eventually be taken for public use. See *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978). The property owner, under such circumstances must show that the landowner is precluded from "all economically feasible private uses pending the eventual taking for public use; or that the designation resulting in such an intrusion as to inflict virtually irreversible damage. This test is not applicable here. There is no "expectation" that the State will take the property, either the land or the timber, for its own use.

A second type of "taking" occurs when the government action deprives the owner of all substantial beneficial or economically viable use of the property. *Lardy v. Washington County,* 122 Or App 361, 857 P2d 885, rev den 318 Or 246 (1993). No particular denial of an application for a use demonstrates the loss of all economic use. The fact that one use is impermissible under a regulation does not necessarily mean that other economically productive uses are also precluded. Additionally, until alternative uses are applied for or attempted, there can be no conclusive authoritative determination of what is legally permitted by the regulations. The Seiber's vehement refusal to apply for an incidental take permit, or to consider other uses of the land makes their claim of a "taking" fail.

There is no evidence as to what the landowners intended to do with the property, or when or how they acquired it. However, assuming that it was originally intended as an investment, it would be inappropriate to find a taking. Investments are made with the knowledge of governmental power to make laws for its conduct, and the balancing of regulatory goals against their economic consequences is the

daily stuff of politics rather than of litigation for "just compensation". See *Suess Builders, v. City of Beaverton*, 294 Or 254, 656 P2d 306 (1982).

In *Dodd v. Hood River County*, 317 Or 172, 855 P2d 608 (1993), the Oregon Supreme Court applied the test as set out in *Lucas*, supra. The court applied a standard equivalent to *Lucas*, in that it looked at whether the landowner had "some substantial beneficial use of the property". See also, *Dolan v. City of Tigard*, 317 Or 110, 854 P2d 437 (1993). As discussed above, the entire bundle would have to be considered. In this case, the landowner has failed to show that there is no remaining value to the 196 acre parcel. In fact, the evidence shows that there is considerable value as a homesite, and for other purposes.

At the hearing, counsel for the landowner indicated that he believed *Dunn v. City of Redmond*, 303 Or 201, 735 P2d 609(1987) precludes the Board from acting in this case. In Dunn had claimed that city ordinances were invalid under both the Oregon and U.S. Constitutions. Mr. Dunn challenged the Land Use Board of Appeals determination. The issue before the court was LUBA's jurisdiction. Under the enabling statutes, the board had the authority to reverse or remand land use decisions if it finds that a local government made an unconstitutional decision. The court held, that under the statutory scheme an individual could challenge the constitutionality of a land use decision to LUBA if the goal were to have the ruling set aside. If the individual wished for compensation for the government's acts, jurisdiction would belong in Circuit Court. The Board of Forestry has no similar limitations on its authority. The Court found in *Boise*, supra, that the Board does have jurisdiction over such issues. The landowner's argument about the applicability of Dunn is without merit.

FINAL ORDER

The denial of the Seiber's written plan was appropriate under OAR 629-665-0210. Application of the rule does not cause a taking under either the U.S. or the Oregon Constitutions.

/s/ Wendy Lewis
Wendy Lewis

Administrative Law Judge

Dated this *28* day of March 1998

NOTICE: You are entitled to judicial review of this Final Order. Judicial review is by the Oregon Court of Appeals pursuant to the provisions of ORS 183.482. Judicial review may be obtained by filing a petition for review with the Office of the State Court Administrator, Supreme Court Building, Salem, Oregon 97310, within 60 days from the service of the final order.

In the event the Final Order is appealed to the Oregon Court of Appeals, a copy of the petition should be mailed to Hearings Section, Employment Department 875 Union Street NE, Salem, Oregon 97311, as a means of expediting the preparation of the record.

Supreme Court, U.S.
FILED
OCT 7 2002
OFFICE OF THE CLERK

No. 02-348

In the

Supreme Court of the United States

MARSHA SEIBER, et vir.,

Petitioners,

v.

STATE OF OREGON, et al.,

Respondents.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION, OREGON FARM BUREAU FEDERATION, AND OREGON CATTLEMEN'S ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Where the government requires a property owner to submit to the physical occupation of its land, may the government evade liability for a physical taking merely because it did not "cause or induce" the occupation?

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Supreme Court Rule 37 1

INTEREST OF AMICI CURIAE

For nearly three decades, amicus Pacific Legal Foundation (PLF) has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Finally, PLF has participated as amicus curiae in nearly every major real property takings case, and numerous other takings cases, heard by this Court in the past two decades.[1]

Oregon Farm Bureau Federation has represented the interests of farmers, ranchers, and small timber owners for the past 77 years as the largest general agricultural organization in that state. With more than 20,000 members, Oregon Farm Bureau Federation represents one of the largest blocks of private landowners in Oregon. Because of the climate and geography that prevail there, many farms and ranches contain forestland. For this reason, many of Oregon's agricultural producers are primarily forest managers. As such, they are directly affected by restrictions on access to privately owned resources like the restrictions imposed in this case by the state Board of Forestry. The impact of such restrictions is especially dramatic on small landowners like the Seibers. A judicial decision as to whether and in what circumstances the public must compensate private

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

property owners who are restricted in their use and possession of resources will have a direct effect on the members of Oregon Farm Bureau Federation.

The Oregon Cattlemen's Association is a nonprofit organization comprising 2,500 members from across the state. The Association works to apply environmentally and scientifically sound industry practices, promote research and education on water quality and habitat, integrate economic use of natural resources with sustainability, promote a positive image of the cattle industry, improve the economics of the cattle industry, and assure a strong political presence in all areas affecting the industry.

A large number of families in Oregon Farm Bureau Federation and the Oregon Cattlemen's Association are owners of non-industrial timberlands. These timberlands are typically managed as an integral part of a farm or ranch, and they often produce some combination of livestock, vineyards, orchards, and grain as well as a limited amount of timber itself. These privately owned, non-industrial timberlands consist almost exclusively of planted regrowth, which provides not only essential economic support for overall agricultural operations but also important blocks of habitat for wildlife coexisting with carefully planned harvest operations. None of these economic and ecological benefits would exist apart from the investment, industriousness, and stewardship of private landowners.

The ability to enter and harvest timber resources in response to farm or ranch economics and market opportunities is essential to the viability of these family agricultural enterprises. Unpredictable interference with harvests for the purpose of setting aside wildlife habitat may deprive these families of critical assets at a time when they may be badly needed to offset unexpected costs or crop losses. Furthermore, such delays can even result in a total loss of the timber. There is great risk inherent in holding a long-maturing asset that may be destroyed

at any time by fire—a loss that is economically uninsurable for non-industrial operations. Forcing families to forego harvesting their timber so that it can serve as a set-aside for habitat, therefore, not only deprives them of current income that may be critical to economic viability, it also forces them to bear the uncompensated risk that they will lose their total investment. Whether the state has the power—without the payment of any compensation—to place these burdens on private landowners for the purpose of aiding admittedly public wildlife resources is a question of vital importance to CFBF members.

SUMMARY OF ARGUMENT

The Seibers alleged—and no court disagreed—that they were required to submit to the physical occupation of their land by spotted owls as a result of the Oregon Board of Forestry's timber-harvesting regulations. Without questioning this allegation, the courts below rejected the Seibers' physical takings claim on the theory that the state could not be liable for a compensable taking by permanent physical occupation if the state did not "cause or induce" the occupation. In so deciding, the lower court decided an important question of federal takings law in a way that conflicts with this Court's takings jurisprudence and with the decisions of other lower courts.

First, this Court's decisions make clear that the government effects a physical taking whenever it requires a property owner to submit to the physical occupation of his land or (to say the same thing) whenever it deprives the owner of the right to exclude strangers. Under either formulation, it is *required acquiescence* that is the touchstone of a compensable physical occupation. This Court's decisions further make clear that the government cannot evade takings liability merely because the instrument of the required occupation was not the government itself but rather a third party. In none of these decisions did the Court make the government's "causing or inducing" the third-

party occupation a prerequisite to liability. Indeed, in each of the cases, the government merely "permitted" the occupation, which resulted from the independent choice of a third party.

Second, lower courts have applied this Court's physical takings jurisprudence in a manner that conflicts with the decision below. These courts have found that physical takings are (or would be) effected by two federal regulatory schemes that require property owners to acquiesce in physical occupations by their competitors. Under neither of these schemes could the government be said to "cause or induce" the occupations, and no court made such causing or inducing a prerequisite to finding a taking. Moreover, the courts rejected the argument that a required acquiescence in a physical occupation could be justified as a "permissible regulation of the *use* of real property."

ARGUMENT

IN RULING THAT A STATE CANNOT BE LIABLE FOR A PERMANENT PHYSICAL OCCUPATION IF IT DOES NOT "CAUSE OR INDUCE" THE OCCUPATION, THE COURT BELOW DEPARTED FROM THIS COURT'S DECISIONS AND EXACERBATED A CONFLICT AMONG THE LOWER COURTS

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), this Court identified "at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." The first instance of what are called "categorical" takings "encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* As to such physical invasions—also called physical "occupations"—the law is that "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.* As set forth below, the Seibers suffered this kind of categorical taking when the State forced them to submit to the physical occupation of their land by spotted

owls. In determining otherwise, the Oregon courts rejected this Court's physical takings jurisprudence and exacerbated a split in the lower courts on an important question of takings law.

A. The Issue and the Lower Court's Ruling

In its most recent consideration of categorical takings by physical occupation, this Court explained that the government effects a physical taking whenever "it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992). To rephrase the point, a physical taking occurs whenever the government deprives a property owner of his "right to exclude," a right that is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 528 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). In either formulation, it is the "element of *required acquiescence* [that] is at the heart of the concept of occupation." *Id.* at 527 (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987)). Indeed, the Court recently noted the obvious point that this required acquiescence is often effected by means of *regulation*: where "regulations . . . require the [property owner] to suffer the physical occupation of a portion of his building," they will be analyzed not as regulatory takings but rather as physical takings. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1479 n.18 (2002) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).

In the present case, the Seibers alleged in their inverse condemnation complaint that the purpose of the Oregon Board of Forestry's regulations was to *require* every timberland owner to maintain any property containing spotted owl nests in such a manner that the property could "be *occupied* annually by a pair of adult spotted owls who are capable of breeding." Petition Appendix (Pet. App.) at 38a (emphasis added). The complaint further alleged that the Board "requir[ed]" the Seibers to

maintain their timberland in such fashion that the land could "be *occupied* as a spotted owl nesting site" without any time limitation. *Id.* (emphasis added). In brief, the Seibers alleged that the Board intended to, and in fact did, require them to submit to the physical occupation of their land by spotted owls. Or, to frame the allegation in other pertinent terms, the Board deprived the Seibers of the right to exclude the owls from their property and instead required them to acquiesce in the owls' presence on their land. In so alleging, the Seibers successfully stated a claim for a categorical taking by physical occupation under this Court's precedents.

Without in any manner questioning the accuracy of the Seibers' allegations concerning the purpose and effect of the Board of Forestry's regulations, the Oregon courts rejected the Seibers' physical occupation claim. It is apparent that this rejection was based on the published decision in *Boise Cascade Corp. v. State ex rel. Board of Forestry*, 991 P.2d 563 (Or. Ct. App. 1999), *cert. denied*, 532 U.S. 923 (2001). *See, e.g.*, Pet. App. at 11a (granting the State's motion for summary judgment with respect to the Seibers' physical occupation claim "based on the Court of Appeals' decision in *Boise Cascade*"). In the *Boise Cascade* decision, which rejected a physical occupation claim identical to the claim advanced by the Seibers, the court reasoned as follows: "The state did not cause or induce the spotted owls to breed on [Boise's] property. The state simply regulated [Boise's] use of the property based on the presence of the spotted owls there." 991 P.2d at 570. As set forth below, this reasoning is flawed: the decisions of this Court demonstrate that the Oregon court erred in holding that the government must "cause or induce" an occupation in order to effect a physical taking. More to the point perhaps, the decision below is in conflict with the decisions of many other lower courts.[2]

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[2] It is not unusual for this Court to grant review of an unpublished decision as a means of reviewing the earlier, published ruling that

(continued...)

B. The Conflict with This Court

In *Kaiser Aetna*, the property owners converted a privately owned lagoon into a marina, thereby connecting the lagoon to a publicly owned bay; subsequently, the United States sought "an injunction to require [the owners] to allow public access" to the waters of the marina on the ground that it had become subject to the federal "navigational servitude." 444 U.S. at 169. Having ruled that "Congress could assure the public a free right of access to the [waters of the marina] if it so chose," *id.* at 174, this Court went on to consider whether Congress could do so "without invoking its eminent domain power and paying just compensation," *id.* at 180. The Court emphatically ruled that Congress could ***not***, because "the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina." *Id.* (emphasis added). But just who would actually be doing the "invading"? Not the government, of course, but rather members of the boating "public" based on their own independent choices. To use the Oregon court's terms, the government did not "cause or induce" anyone to sail into the marina; instead, the government "ha[d] no control over where" public boaters chose to navigate their boats. *Boise Cascade*, 991 P.2d at 570. In other words, it was no defense to this Court's finding a physical taking in *Kaiser Aetna* that members of the boating public were not placed or induced onto or into the waters of the private marina by the government or its agents.

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[2] (...continued)
actually drove the outcome below. *Compare McGill v. Duckworth*, 503 U.S. 907 (1992) (denying certiorari to *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991)), *with Farmer v. Brennan*, 511 U.S. 825 (1994) (reviewing the Seventh Circuit's ruling in *McGill* by means of a case in which that court had issued no opinion). *Cf. Chisom v. Roemer*, 501 U.S. 380 (1991) (granting review to consider the Fifth Circuit's en banc decision in a previous case).

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), is similar in essential regards. In that case, "New York law provide[d] that a landlord must permit a cable television company to install its cable facilities upon his property." *Id.* at 421. This Court concluded that "such a physical occupation of property is a taking." *Id.* Yet again, it was not the *government* (or its agents) that occupied the landlord's property; rather, the occupier was a privately owned cable television company acting on its own behest. Indeed, the Court characterized the case as one in which the government's regulations "require[d] the landlord to suffer the physical occupation of a portion of his building *by a third party*." *Id.* at 440 (emphasis added); *accord Florida Power Corp.*, 480 U.S. at 252 (quoting same); *Tahoe-Sierra*, 122 S. Ct. at 1479 n.18 (quoting same). As relevant to the present case, it is crucial to recognize that the New York City government did not "cause or induce" the cable company to occupy the property of the landlord. 991 P.2d at 570. No, the government merely "permit[ted]" the occupation, *Loretto*, 458 U.S. at 421, and thereafter "simply regulated [the landlord's] use of the property based on the presence of the [cable facilities] there," 991 P.2d at 570—that is, prohibiting the landlord from taking any action that would interfere with or otherwise disturb those facilities.

Finally, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987), this Court held that had the government "required the [property owners] to make an easement across their beachfront available to the public on a permanent basis . . . , we have no doubt there would have been a taking." The Court reached this conclusion *even though* that property would have been periodically occupied not by the government, but by random members of the beachgoing public:

> In *Loretto* we observed that where governmental action results in "a permanent physical occupation" of the property, by the government itself *or by others*, "our cases uniformly have found a taking to the ex-

> tent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

Id. at 831-32 (emphasis added and citations omitted) (quoting *Loretto*, 458 U.S. at 432-35). *Nollan* therefore confirms that physical occupations may be effected "by the government itself *or by others*." Because the government in no way caused or induced the public to traverse the property owners' beachfront —the government merely required that a lateral easement be made "available"—*Nollan* also confirms that the government's *causing or inducing* the occupation is not a prerequisite to its liability for a categorical taking by physical occupation.

C. The Conflict with Other Lower Courts

In the past decade, a variety of statutory and regulatory schemes have required the lower courts to apply this Court's physical takings jurisprudence. Several of the resulting decisions are in conflict with the decision below.

We turn first to the "mandatory access provision" of the federal Pole Attachment Act. Under that provision, a public utility company "shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it" for the purpose of installing and carrying television or telephone wires. 47 U.S.C. § 224(f)(1). Under implementing regulations issued by the Federal Communications Commission, a cable or telephone company's access to, and use of, a utility's property to install and carry wires is triggered by a *request* from that company.[3] Accordingly, any use of that property by third

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[3] *See* 47 C.F.R. § 1.1403(b) ("*Requests for access* to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing." (emphasis added)); 61 Fed. Reg. 45,476, 45,588 (1996) (observing that the statute "reflects Congress'

(continued...)

parties depends on the independent choices of those parties. In other words, just as in *Nollan*, the statute in no way *causes or induces* cable or telephone companies to use the utility's property; rather, the statute "requires that poles, ducts, conduits and rights-of-way controlled by utilities [be] *made available*" to requesting companies.[4]

Notwithstanding the lack of causation or inducement on the part of the government, the Eleventh Circuit had no trouble concluding that "the Act's mandatory access provision effects a [physical] taking of a utility's property." *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999) (citation omitted). The court readily recognized that, like the Seibers vis-à-vis nesting owls, a utility "has no choice but to permit a cable [or telephone company] to permanently occupy physical space" on or in its property. *Id.* In contrast to the state courts that decided and applied *Boise Cascade*, the Eleventh Circuit correctly perceived that "[s]uch a permanent, physical occupation of property falls squarely within the *Loretto* rule." *Id.* at 1329.

The conflict is even more explicit, however. Recall that the court below ruled that requiring property owners to acquiesce in the presence of the owls did not effect a physical occupation because the Board of Forestry "*simply regulated* [the]

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[3] (...continued)
determination that utilities generally must accommodate *requests for access* by telecommunications carriers and cable operators" (emphasis added)); *id.* at 45,593 ("Section 224(f)(1) mandates that a utility grant access to a *requesting* telecommunications provider or cable system operator . . . ." (emphasis added)).

[4] H.R. Conf. Rep. No. 104-458, *reprinted in* 142 Cong. Rec. H1078, H1133 (Jan. 31, 1996) (emphasis added) (discussing "Section 204 of the Senate bill"); *cf. id.* at H1134 (observing that as to Section 204, "[t]he conference agreement adopts the Senate provision with modifications").

use of the property based on the presence of the spotted owls there." *Boise Cascade*, 991 P.2d at 570 (emphasis added). The Eleventh Circuit confronted a similar argument—"the mandatory access provision [is] a *simple regulatory* condition"—and quickly rejected it as "meritless." *Gulf Power Co.*, 187 F.3d at 1330 (emphasis added). "Characterizing the mandatory access provision as a regulatory condition," concluded the court, "cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property." *Id.* at 1331.

More generally, the "power to regulate [property] does not extend to taking without just compensation the right of a [property owner] to exclude unwanted occupiers of its property." *Id.* As the Eleventh Circuit observed, among other arguments this Court rejected in *Loretto* "was the argument that the statute was merely a 'permissible regulation of the use of real property.' . . . [A]lthough property is subject to broad regulatory power, a regulation becomes a taking when the government authorizes permanent physical occupation by a third party." *Id.* at 1328 (quoting *Loretto*, 458 U.S. at 439).

We turn next to another "access" scheme, this one called "physical co-location," under which local telephone exchange companies (LECs) are required "to set aside a portion of their central offices for occupation and use by competitive access providers" (CAPs). *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1443 (D.C. Cir. 1994). "In physical co-location," according to the D.C. Circuit, "the CAP strings its cable to the LEC central office"; the LEC "must then turn over space within the central office in which the CAP may install and operate its circuit terminating equipment." *Id.* at 1444. The *Bell Atlantic* litigation involved a challenge to an FCC order that generally "require[d] LECs to permit CAPs to connect their facilities to the LEC network through" physical co-location. *Id.* In sustaining this challenge, the D.C. Circuit concluded that the order "directly implicates the Just Compensation Clause of the Fifth

Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.' " *Id.* at 1445 (quoting *Loretto*, 458 U.S. at 426). Why? Because it would result in "an identifiable class of cases in which application of [the order] will necessarily constitute a taking." *Id.* (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)).[5]

Like the Eleventh Circuit's decision in *Gulf Power*, the D.C. Circuit's decision in *Bell Atlantic* cannot be squared with *Boise Cascade*. Although the challenged FCC order was said to "require" physical co-location, *Bell Atlantic*, 24 F.3d at 1443, that was merely shorthand for saying that physical co-location was required *if, and only if, it was requested by the CAP*. *See id.* at 1444 (framing issue as whether "the Commission lacks authority . . . to require LECs to permit physical co-location of equipment *upon demand*" (emphasis added)). In other words, perhaps to labor the point, the order found to effect a physical taking in *Bell Atlantic* surely did not *cause or induce* the CAP to occupy LEC property. Therefore, the fact that "[t]he state did not cause or induce the spotted owls to breed on [the] property," *Boise Cascade*, 991 P.2d at 570, offers no basis for distinguishing the decisions of the Oregon courts. No basis, that

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[5] *Accord GTE Service Corp. v. FCC*, 205 F.3d 416, 421 (D.C. Cir. 2000) (vacating a subsequent FCC co-location order in part because it "may result in unnecessary [physical] takings of LEC property"); *GTE Southwest Inc. v. Public Utility Commission*, 10 S.W.3d 7, 11 (Tex. App. 1999) (ruling that "the Commission's order amounts to a physical or per se taking of GTE's cables and facilities by requiring that GTE surrender its right to exclude others from physical use of its properties"); *id.* at 13 (explicitly "disagree[ing]" with the contention that "the Commission's order amounts not to a taking in the *Loretto* sense, but only to permissible regulation"); *GTE Northwest Inc. v. Public Utility Commission*, 900 P.2d 495 (Or. 1995) (invalidating state-law physical co-location scheme as a physical taking), *cert. denied*, 517 U.S. 1155 (1996).

is, other than a straightforward conflict in the interpretation of federal takings law.[6]

In all of these cases it could reasonably be asserted, as the court asserted in *Boise Cascade*, that the government "simply regulated [owners'] use of the property based on the presence of" the occupying instrumentalities. 991 P.2d at 570. That is, whenever boaters, cable equipment, telephone equipment, or beachgoers were "present" on their property, the owners were restricted in their "use" of it. But the restrictions were of a particular kind: the owners could not use their property in ways that would interfere with the occupiers' government-sanctioned use. That is precisely the kind of "regulation" the Seibers endured based on the presence of spotted owls—restrictions on using their forestland in ways that would interfere with owls' present and future use of that same land as habitat. That is, the Seibers' use of their property was not regulated in the abstract; it was regulated for the purpose of—and with the actual effect of—requiring the Seibers to acquiesce in the owls' presence and, concomitantly, preventing them from excluding the owls. The *whole point* of the Board of Forestry regulations applied against the Seibers is to ensure that spotted owls remain in their nests on the designated property. *See, e.g.*, Or. Admin. R. 629-665-0210(1)(b) (mandating that every timber harvesting plan

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[6] In the reported decisions discussed herein, the range of things that can effect takings by physical occupation runs from humans (*Kaiser Aetna* and *Nollan*) all the way to inanimate objects (*Loretto*, *Gulf Power*, and *Bell Atlantic*). Moreover, one can easily imagine takings by physical occupation where domestic animals are involved; e.g., the government requires *A* to open his pastureland to grazing by *B*'s cattle. Given this spectrum, there is no reason why "wild" animals such as spotted owls should be categorically excluded from physical occupation analysis. Certainly, it cannot be because the government does not "control" wild animals. As the decisions demonstrate, what counts is not control by the government but "required acquiescence" on the part of the property owner. *Yee*, 503 U.S. at 527.

provide for "[p]revention of disturbances resulting from operation activities *which cause*[] *owls to flush from* [i.e., *leave*] *the nesting site*" (emphasis added)), *in* Pet. App. at 22a.

If the government could be liable for a taking by physical occupation in *Kaiser Aetna*, *Loretto*, or *Nollan* without having "caused or induced" the third-party occupations, the government can be (and is) liable for such a taking in the present case. If "simply regulating" private property based on the presence of government-sanctioned third-party occupiers could effect a physical taking in *Kaiser Aetna*, *Loretto*, or *Nollan*, it can (and did) effect such a taking here. In ruling otherwise, the Oregon courts departed from this Court's takings jurisprudence, thereby exacerbating a conflict among the lower courts. The Court should grant the petition for certiorari to resolve that conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: October, 2002.

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FILED
NOV 27 20
CLERK

(3)

No. 02-348

In the Supreme Court of the United States

OCTOBER TERM, 2002

Marsha Seiber and Alvin Seiber,

Petitioners,

v.

State of Oregon, by and through the Oregon State Board of Forestry,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioners state a claim for a physical taking by alleging that the state denied approval of their written plan to harvest 40 acres of merchantable timber on their 200-acre property in order to protect the nesting site of a northern spotted owl near the property.

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Administrative Rules

Or. Admin. R. 629-665-0210(1).....2

STATEMENT OF THE CASE

The Oregon Board of Forestry has a rule that restricts timber harvesting in certain circumstances. The board applied that rule to deny approval to petitioners' plan to harvest 40 acres of timber on 200 acres of land petitioners own and live on. Petitioners filed a taking claim, asserting that the plan denial worked a regulatory taking. They also asserted that, because a purpose of the regulation was to protect endangered owls nesting on the property, the government had physically taken their property.

The trial court dismissed the physical taking claim on the merits with prejudice. The court also dismissed the regulatory taking claim because it was not yet ripe. While petitioners' appeal of the dismissal of their physical taking claim was pending, petitioners ripened their regulatory taking claim and re-filed it in state court. (App A). The owls abandoned their nest site, on a nearby property, and "the State Forester on August 3, 2001 informed plaintiffs that he had declared the nesting site to have been abandoned and, therefore, the defendant withdrew its objections to their harvesting the Subject Timber." (App A, App-4). Petitioners are now proceeding with a temporary regulatory taking claim in Oregon circuit court with a trial scheduled to begin March 3, 2003. (App A, App B)

Oregon's intermediate appellate court affirmed the dismissal of the physical taking claim without an opinion, relying on its previous opinion in *Boise Cascade Corp. v. Bd. of Forestry*, 164 Or. App. 114, 991 P.2d 563 (1999), *rev. den.* 331 Or. 244 (2000), *cert. denied* 532 U.S. 923 (2001). The Oregon Supreme Court also denied review. Petitioners now ask this Court to consider that claim.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The petition overstates the effect of the challenged regulation

This case is about a temporary restriction on one specific land use proposal, to harvest approximately 40 acres of timber. Petitioners attempt to obscure the regulatory nature of the government action by exaggerating how it affects their property. Their assertion that the state has "prevented Petitioners from taking any action to exclude the owls, either by harvesting their habitat or causing them to 'flush from the nest site'" is inaccurate. (Pet 10). (*See also* Pet 11) ("regulation prohibits petitioner from conducting any activity on the property that could 'cause the owls to flush from the nesting site.'"). The only action the state has taken, and the stated basis for petitioners' taking claim, is "denial of their plan to log the subject timber." (Pet, App L, 36a). The state took that action under a regulation that requires a timber operator to obtain approval of a written operations plan for proposed harvesting activities that "will conflict with protection of a nesting site of the northern spotted owl." Or. Admin. R. 629-665-0210(1) (Pet, App G, 22a). When petitioners submitted a plan that did not meet the standards for approval, the state denied the plan.

The state has not done anything else to interfere with petitioner's ability to exclude owls from the property. As far as the challenged regulation is concerned, petitioners are free to erect fences, construct scarecrows, install sound devices, or take any other lawful action, unconnected to timber harvesting, to discourage owls from entering their property. And the only limitation the state has imposed on petitioners' ability to

cause owls to flush from the nesting site is in their conduct of timber harvesting operations.

Petitioners likewise exaggerate when they claim that the regulation requires them to "leave their land in its natural condition so that it can be occupied as wildlife habitat," thereby imposing "a wildlife servitude." (Pet 9). (*See also* Pet 15) (asserting that regulation requires that they leave their property "in its natural state"). The sole regulatory restriction imposed on the property was the denial of a particular plan for harvesting 40 acres of timber. Petitioners have not been prevented from making any other use of their property. They live on the property, and have harvested 15 acres of timber from their property, and plan to log another 25 acres. *Seiber v. U.S.*, 53 Fed. Cl. 570, 579 (2002). They are free to go onto the property and invite others to do so. And they can sell the property. Now that the owls have left the nest tree, they are also free to log the 40 acres they claim the government has taken.

Petitioners likewise overstate the case when they assert that the "regulation goes beyond merely regulating the use of Petitioner's land; it requires that the timber on it be left standing for the sole purpose of providing spotted owl habitat." (Pet 11). That is not true. The state's denial of approval of a particular timber harvesting plan imposed no affirmative obligation on petitioners. It simply regulated when and where they could engage in one type of activity, timber harvesting. For the same reasons, petitioners are also wrong in claiming that the harvesting prohibition "imposes a wildlife servitude

upon Petitioners' timber," and requires them to "set aside timber to provide nesting habitat for spotted owls." (Pet 12).[1]

Petitioners also claim that they "cannot harvest 40 acres of trees that have taken them decades to grow and on which they depend for income during their retirement years." (Pet 11). That argument is no longer true now that the owls have abandoned the nest site near the property. (App A, App-4). And in any event, the argument does not explain why the regulatory restriction should be analyzed as a physical occupation of property, rather than a regulation.

Even petitioners' claim that the owls have physically occupied their property is overstated. Petitioners' complaint in this case alleges a physical taking of a 40-acre area they claim they cannot harvest. (Pet, App L, 32a). Based on that allegation, one might infer that the owls had physically occupied the 40-acre area. But that is not the case. The owls were not occupying petitioners' property at all. Even the owls' nest tree was not on petitioners' property, but "in timber on land immediately to the north of" the property. (App A, App-3).

Thus, this is not a case where the state has taken possession of petitioners' property or forced them to admit wildlife onto the property, or prevented them from doing anything besides undertaking one type of use, the proposed timber harvest. And the state's actions to protect a nesting tree near petitioners' property have not "forced" petitioners to allow owls to occupy their property. This is simply a case where the state temporarily prevented petitioners from cutting down trees on

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[1] Petitioners also assert that "much of the subject timber has blown down" since 1998 and "the wood is no longer of merchantable quality." (Pet 14). The record contains no evidence to support that assertion, and the state does not believe it is accurate.

one portion of their property to avoid harm to owls nesting nearby. That is, the state has prevented petitioners from engaging in a particular activity on a portion of their property, as land use regulations do all the time.

Petitioners' argument that the regulatory restriction in this case should be analyzed as a physical taking instead of a regulatory taking is based solely on the *reason* the state has imposed the use restriction, without considering the functional consequence of the regulation itself. Petitioners argue that, because the purpose of the restriction was to avoid harm to owls nesting in trees near the property, a court should treat their claim as a per se physical taking, without examining the various factors that a court must consider in resolving a regulatory taking claim. But this Court's cases have always—necessarily—focused on consequences in assessing whether there has been a physical taking. For example, a restriction on timber harvesting in order to control erosion would have the same consequence as an identical restriction to prevent harm to wildlife. Yet no one would seriously contend that a restriction to control erosion should be treated as a physical taking; there is no reason to treat the same restriction, imposed for a different purpose, differently.

II. This case presents the same legal question this Court considered when it denied certiorari in *Boise*.

This Court previously denied certiorari in *Boise Cascade Corp. v. Bd. of Forestry,* 164 Or App 114. That decision held that the trial court had erred in not striking a claim that "denial of plaintiff's plan to harvest timber" under the regulation at issue in this case "constituted a *per se* taking" under *Loretto* [*v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982)]. *Boise,* 164 Or. App. at 125.

Petitioners now ask this Court to consider precisely the same legal question raised in the earlier petition and to review an unpublished trial court decision that relied on *Boise*. Petitioners have not shown how the unpublished trial court decision is likely to have any precedential value, or how any decisions since the Court denied certiorari in *Boise* conflict with that decision. A recent decision by the Federal Circuit Court of Appeals considering a harvest prohibition identical to the one in this case, cited, discussed, relied on and followed *Boise*. *Boise Cascade Corp. v. U.S.*, 296 F.3d 1339 (Fed. Cir. 2002). A trial court within the Federal Circuit considering the same prohibition, as applied to petitioners' property, followed the Federal Circuit decision and reached the same result. *Seiber v. U.S.*, 53 Fed. Cl. 570.

III. There is no conflict with other decisions.

Petitioners claim that two subsequent decisions conflict with *Boise*. That argument in support of certiorari is not persuasive. One of those decisions was by a trial court within the Federal Circuit, reached before the Federal Circuit's *Boise* decison. *Tulare Lake Basin Water Storage District v. U.S.*, 49 Fed. Cl. 313 (2001). This Court should allow the Federal Circuit to determine, in the first instance, whether *Tulare Lake* conflicts with the Federal Circuit *Boise* decision.

Petitioners also argue that this Court's recent decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. __, 122 S. Ct. 1465 (2002) is inconsistent with the Oregon *Boise* decision. That argument is mistaken. *Tahoe* explained that physical taking doctrine applies to action that "gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property,

nor does it dispossess the owner or affect her right to exclude others." *Tahoe,* 122 S Ct 1479-1480 n 19. This case involves a temporary restriction on timber harvesting. The state did not directly use the property or dispossess petitioners or affect their right to admit or exclude anyone from the property. Thus, *Tahoe* supports the conclusion the trial court reached in this case, that the government action should be analyzed as a regulatory, not a physical taking claim.

Petitioners point to other decisions that supposedly conflicted with *Boise* when it was decided. But all of those decisions are at least 40 years old or found no taking.[2] In sum, *Boise* does not conflict with this Court's physical taking jurisprudence, and there is no split of authority among lower courts that merits this Court's attention.

IV. The regulatory restriction in this case did not interfere with property rights seriously enough to come under the *Loretto* rule.

Respondents recognize that there may be circumstances where a property use regulation could be so intrusive it could amount to a physical taking. *Loretto* described the type of interference that might meet that test. "Property rights in a physical thing" consist of the rights to possess, use, and dispose of it, and a permanent physical occupation "effectively

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2 Petitioners acknowledge that the only post *Loretto* cases they cite in this regard, *Moerman v. State,* 21 Cal. Rptr.2d 329, 333-334 (Cal. Ct. App. 1993) and *Southview Associates, Ltd. v. Bongartz,* 980 F.2d 84, 95 (2d Cir. 1992) each found no taking. One of the older cases petitioners cite, *Bailey v. Holland,* 126 F.2d 317 (4th Cir. 1942), reversed a lower court decision enjoining enforcement of the challenged regulation. The other two cited cases are both more than 40 years old, and, because they pre-dated *Loretto* by two decades, did not purport to construe or apply it. *State v. Herwig,* 117 N.W. 2d 535 (Wis. 1962); *Shellnut v. Ark. State Game & Fish Comm'n,*, 258 S.W.2d 570 (Ark 1953).

destroys *each* of these rights." *Loretto,* 458 US at 435 (emphasis in original). "First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space." *Id.* "Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property." *Id.* at 436. "Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will be unable to make any use of the property." *Id.* In sum, the government's actions enable the invader to "exercise complete dominion" over the owner's property. *Id.* at 441.

Nothing approaching the level of interference described in *Loretto* has occurred here. Neither the state, nor the owls, has ever exercised anything like "complete dominion" over the property. The state has not – temporarily, much less permanently – effectively destroyed petitioners' rights to possess, use, or dispose of the property. The state did not obtain an interest in the property, or take possession, or dispossess petitioners. It did not admit or exclude – or prevent petitioners from excluding – any persons or the public generally. Except for the specific denial of a particular harvest plan, petitioners have retained full control over the property's use. And petitioners cannot show that the property was emptied of value, or that they could not have conveyed their rights over the use and disposition of the property to a prospective purchaser. In sum, the temporary use restriction was neither qualitatively nor quantitatively severe enough to come within the *Loretto* rule.

Loretto recognized "a State's broad power to impose appropriate restrictions upon a property owner's *use* of his property" without compensation. *Loretto*, 458 US at 441 (emphasis in original). And this Court has repeatedly declined to apply *Loretto* to actions regulating how property can be used. E.g. *Yee v. City of Escondido,* 503 U.S. 519, 537-539 (1992); *FCC v. Florida Power Corp.,* 480 U.S. 245, 251 (1987). *See also U.S. v. Sperry*, 493 U.S. 52, 62 n 9 (1989) (rejecting "extravagant extension of *Loretto*"). The *Loretto* rule, by its terms, is "very narrow," *Loretto,* 458 US at 441, and does not extend to the use restriction in this case.

Finally, *amici* claim that there is a conflict between *Boise* and lower court decisions recognizing that placement of utility attachments on private property comes within the *Loretto* rule. (Am Br 9-14). *Loretto* comprehensively inventoried government liability for physical invasions without discussing or citing any cases recognizing categorical liability for an invasion not caused or carried out by a person. *Loretto*, 458 US at 427-31. The Court specifically mentioned bridges, railroad and streetcar lines, telephone and telegraph lines, underground pipes or wires, gas, water, or sewer lines, and floods caused by dam construction as invasions that could give rise to takings liability. *Id.* The Court has also recognized that a property owner may be entitled to compensation for loss of the right to exclude when the government authorizes the public to enter or cross private property, effectively acquiring a public easement. *Dolan v. City of Tigard,* 512 U.S. 374 (1994). *Nollan v. California Coastal Comm'n,* 483 US 825 (1987); *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979).

Those cases all involved purposeful human action leading directly to an occupation. In each case, government action allowed humans to enter, or place objects, or deposit flood-

water on property without the owner's consent. And in each case, without the government authorization, the owner would have had some legal remedy for the invasion: for example in a trespass action. The utility placement cases the *amici* cite fall within that rule. But petitioners and *amici* cite no modern case where a court has treated a regulatory action to protect an owl's nest in a tree near, but not on, a claimant's property as an occupation of that property for purposes of *Loretto*.

CONCLUSION

If petitioners wish to obtain categorical treatment for their challenge to a government regulation, they must do so in a regulatory context, by showing that the regulation "denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1019, 1015 (1992). And that is precisely what they are trying to do in the taking action now pending in state court. (App A). But petitioners cannot show that this Court should grant certiorari to review the trial court's unpublished decision refusing to treat the timber harvesting prohibition in this case as a physical taking.

Respectfully submitted,

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November 27, 2002

APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF LINN

MARSHA SEIBER and ALVIN SEIBER, Plaintiffs, v. STATE OF OREGON, by and through THE OREGON STATE BOARD OF FORESTRY, Defendant.	No. 01-0333 SECOND AMENDED COMPLAINT (For Declaratory Relief and Inverse Condemnation Action for a Regulatory Taking of Private Property for a Public Purpose)

Plaintiffs allege as follows:

INTRODUCTION

1.

Plaintiffs Marsha Seiber and Alvin Seiber (the "Seibers") are the owners of approximately 200 acres of property (the "Property") located in Linn County, which plaintiff Marsha Seiber acquired through inheritance in 1986. About 185 to 190 acres of the Property are commercial timberlands.

2.

In August 1990, the Oregon State Forester (the "OSF") adopted an interim spotted owl policy precluding timer harvest within a 70-acre core area of the best available suitable habitat in the vicinity of the nest site. The Oregon State Board of Forestry (the "Board") subsequently adopted former OAR

629-024-0809 (present OAR 629-665-0210), which requires protection of a 70-acre core area of suitable northern spotted owl habitat encompassing the nest site. That provision states in part:

> "(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentialis caurina), the operator must obtain the state Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> "(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
>
> "(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. * * *
>
> "(2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. * * *
>
> * * * * *
>
> "(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal

authorities under the federal Endangered Species Act." OAR 629-665-0210.

FACTS GIVING RISE TO PLAINTIFFS' CLAIMS

3.

Timber of the kind found on the Property is considered by defendant to be suitable nesting habitat for spotted owls. In 1994, the OSF informed plaintiffs that in April of that year a pair of northern spotted owls ("Little Wiley Owls") was discovered nesting in timber on land immediately to the north of the Property. The OSF then designated approximately 40 acres (the "Subject Timber") of the Property as northern spotted owl nesting habitat pursuant to OAR 629-665-0210 and informed plaintiffs they would not be allowed to log that area, so long as the activity site remained active under Oregon law.

4.

In 1997, plaintiffs were informed by the OSF that the owls had not nested adjacent land during that year. On February 4, 1998, plaintiffs filed Notification No. 98-791-40082 giving notice to the OSF of their desire to log the Subject Timber. In seeking to log the Subject Timber, plaintiffs indicated they were willing to not conduct logging operations while spotted owls might be nesting in the area (March 1 through September) or until the young spotted owls had fledged, to avoid any incidental harm to them. Even though the owls had not nested in the area during 1997, plaintiffs' plan to log the Subject Timber was denied approval on February 19, 1998 on the ground that it failed to describe how the operation would be conducted to provide a 70-acre core area of suitable spotted owl habitat consistent with the requirements of OAR 629-665-0210(1)(a).

5.

Plainfiffs then made a timely appeal of the OSF's denial of their plan to log the Subject Timber to the Board. On or about March 27, 1998, the Board entered a final order that affirmed the denial of plaintiffs' plan. The denial of plaintiffs' written plan by the Board was a final administrative action prohibiting plaintiffs from logging the Subject Timber.

6.

To obtain a waiver of 629-665-0210(1), pursuant to section (5) of that regulation, plaintiffs then submitted an application for an Incidental Take Permit ("ITP") to the U.S. Fish and Wildlife Service (the "USFWS"), after preparing a Habitat Conservation Plan ("HCP") as required by the federal Endangered Species Act ("ESA"). On November 9, 2000, the USFWS issued a Final Order, signed by the Regional Director denying plaintiffs an ITP for the Little Wiley Owls, even though they had not nested in the designated core area that includes the Subject Timber since 1996.

7.

After the USF&WS declined to issue plaintiffs an ITP, the State Forester on August 3, 2001 informed plaintiffs that he had declared the nesting site to have been abandoned and, therefore, the defendant withdrew its objections to their harvesting the Subject Timber.

CLAIM ONE
(Declaratory Relief--Facial Challenge to OAR 629-665-0210)

8.

Plaintiffs reallege paragraphs 1 through 7 above.

9.

Plaintiffs seek a declaratory judgment pursuant to ORS 28.010, et seq., that OAR 629-665-0210 effects a taking of plaintiffs' property for a public purpose under the Fifth Amendment to the U.S. Constitution. Timber owners who are not permitted to log their timber on account of that rule are required to submit to a physical occupation of that property for use as a spotted owl nesting site; at that same time, they are denied all economic productive use of timber that cannot be logged on account of being preserved as a nesting site. The Board lacks the power of eminent domain authority to obtain a "conservation easement" for the purpose of obtaining property to be maintained as suitable spotted owl habitat; therefore, it did not have the authority to promulgate OAR 629-665-0210 which imposes a wildlife servitude for that purpose. GTE Northwest, Inc. v. Public Utility Commission, 321 Or 458, 900 P2d 495 (1995).

CLAIM TWO
(Oregon Constitution)

10.

Plaintiffs reallege paragraphs 1 through 7 above.

11.

From April 1994 until August 2001 the 40 acres of Subject Timber that plaintiffs has been prohibited from logging contain approximately 800,000 board feet of merchantable timber, much of which was infested with root rot that caused many of the trees to fall down and to no longer be of merchantable quality. The market price of the merchantable timber also declined significantly from 1994 to 2001. As a result of not being able to harvest their timber during that period plaintiffs have suffered a loss of $467,462.00.

12.

The Board's denial of plaintiff's plan to log the Subject Timber to preserve it as a spotted owl nest site and core area habitat constituted a taking of plaintiffs' property for a public purpose, which requires defendant to pay plaintiffs just compensation for the subject timber pursuant to Article 1, section 18, of the Oregon Constitution.

13.

The Subject Timber that plaintiffs desire to log has no economic value unless harvested.

14.

The Board's action in denying plaintiffs the right to log the Subject Timber has denied plaintiffs of economically productive use of that property interest.

15.

Plaintiffs are entitled to interest at the rate of 9 percent from August 3, 2001, and their reasonable attorney fees, pursuant to ORS 20.085.

CLAIM THREE
COUNT ONE

(Lucas Per Se Claim--U.S. Constitution)

16.

Plaintiffs reallege paragraphs 1 through 7, 11, 13, and 14 above.

17.

The Board's action in denying plaintiffs the right to log their property deprived plaintiffs of all economically productive use of their merchantable timber and constituted a taking of plaintiffs' property for a public purpose, which requires

defendant to pay plaintiffs just compensation of their property under the Takings Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.

CLAIM THREE
COUNT TWO

(Agins Claim--U.S. Constitution)

18.

Plaintiffs reallege paragraphs 1 through 7, 11 and 13 above.

19.

In 1987 the Oregon legislature enacted a state Endangered Species Act. ORS 496.192(1), which is a part of that act, states that it is was not intended

> "to require an owner of any commercial forestland or other private land to take action to protect a threatened species or endangered species, or to impose additional requirements or restrictions on the use of private land."

20.

That same session of the legislature also adopted ORS 527.630(1), which provides, in part, that "it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that ensure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land. * * *"

21.

Defendant took no action to adopt what is now OAR 629-665-0210 or otherwise protect northern spotted owl habitat on private lands until the bird was declared a threatened species

under the federal ESA in July 1990. OAR 629-665-0120 was adopted as a result of the USFWS adopting guidelines requiring the protection of a minimum of 70 acres of habitat around every northern spotted owl nest site.

22.

However, when the USFWS was required to designate critical habitat for the recovery of the species, it only designated lands owned by the federal government as critical habitat for the northern spotted owl. Further, the USFWS rescinded its 70-acre guideline as applying to private property after a federal court found that it had not been adopted according to law.

23.

OAR 629-665-0210 does not substantially advance a legitimate state interest because it singles out only some timber owners to bear the burden of providing nesting habitat for the spotted owl, while other timber owners in the same area are free to harvest their timber. Therefore, enforcement of OAR 629-665-0210 constitutes a taking of private property for a public purpose in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution.

CLAIM THREE
COUNT THREE

(Penn Central-U.S. Constitution)

24.

Plaintiffs reallege paragraphs 1 through 7, 11, 13, 19, 21 and 22 above.

25.

Pursuant to Oregon law, plaintiffs acquired and have managed their timberlands with the investment backed expectation that they could use them for the continuous growing

and harvesting of forest tree species, in order to provide income during their retirement. The application of OAR 629-665-0210 to forty acres of their property prevents them from managing their property in accordance with their investment backed expectations and prevents them from realizing income from the tree crop on those forty acres. Therefore, enforcement of OAR 629-665-0210 constitutes a taking of private property for a public purpose in violation of the taking Clause of the Fifth Amendment to the U.S. Constitution.

Wherefore, plaintiffs pray that:

A. OAR 629-665-0210 be declared invalid because it takes private property for a public purpose;

B. The Seibers be awarded the sum of $467,462.00, together with interest thereon at the rate of 9 percent per annum from August 3, 2001;

C. The court award plaintiffs their reasonable attorney fees and costs.

DATED: November 19, 2002.

s/Phillip D. Chadsey, OSB No. 66028

Attorneys for Plaintiffs
Trial Attorney: Phillip D. Chadsey

APPENDIX B

August 23, 2002

Phillip D. Chadsey, Esq
Standard Insurance Center
900 SW Fifth Ave., Suite 2600
Portland, OR 97204

Karen L. Moynahan, Esq
Department of Justice
1162 Court Street NE
Salem, OR 97301

Re: Seiber v. State of Oregon (Board of Forestry)
Linn County Case Number: 01-0333

Counsel:

During our pre trial conference today we agreed on the following:

1. The following parts of the amended complaint shall proceed to jury trial: Claim Two; Claim Three (Ct. 2); and Claim 3 (Ct.3).

2. Trial will begin on March 3, 2003 at 9:30 AM in Courtroom 1. Except for the morning of Thursday, March 6, the case will occupy the docket the remainder of that week.

3. Plaintiff will be allowed to depose a state employee concerning the methodology of and reasoning behind the setting of the boundaries in this case.

4. Neither party anticipates any further pre-trial motions.

5. The deadline for discovery shall be in 60 days: October 23, 2002. The court will not view favorably and may deny requests for discovery made after that date.

6. Plaintiff will initiate a conference call with the court at 8:30 AM on February 18, 2003 so that counsel and the court can confer one final time prior to trial to address any last minute details.

7. Counsel will submit proposed written jury instructions prior to trial. They are encouraged to do so by email. Please submit either a Word document or Word Perfect document, with file suffixes of either wpd. or doc.

Enclosed is this judicial district's policy on continuances. Absent very good cause no continuance will be allowed.

Sincerely yours,

s/Daniel R. Murphy
Daniel R. Murphy
Circuit Judge email: Daniel R. Murphy@ojd.state.or.us

(4)

No. 02-348

Supreme Court, U.S.
FILED
DEC 9 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MARSHA SEIBER and ALVIN SEIBER,
Petitioners,

v.

STATE OF OREGON, by and through the
OREGON STATE BOARD OF FORESTRY,
Respondents,

and

AUDUBON SOCIETY OF PORTLAND,
OREGON TROUT, INC., PACIFIC
COAST FEDERATION OF FISHERIES, and
INSTITUTE FOR FISHERIES RESOURCES,
Intervenors-below.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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December 9, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

35 pp

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IN THE

Supreme Court of the United States

No. 02-348

MARSHA SEIBER and ALVIN SEIBER,
Petitioners,

v.

STATE OF OREGON, by and through the
OREGON STATE BOARD OF FORESTRY,
Respondents,

and

AUDUBON SOCIETY OF PORTLAND,
OREGON TROUT, INC., PACIFIC
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INSTITUTE FOR FISHERIES RESOURCES,
Intervenors-below.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

A. The State Imposed a Servitude Upon Petitioners' Land for a Public Purpose.

Both elements of a physical taking are present in this case. Through the subject regulation the State of Oregon used Petitioners' timber for the public purpose of preserving a wildlife habitat for Northern Spotted Owls and restricted Petitioners' right to exclude the owls from their land. *Tahoe-Sierra Preservation Council v. Tahoe Regional Plan*

Agency, 122 S. Ct. 1465, 1479 n. 19 (2002). The State's factual arguments to the contrary are incorrect.

1. The Owls Were Authorized to Invade and Occupy Petitioners' Property.

Where the government authorizes a physical occupation of private land, there is a *per se* taking that requires just compensation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982). The State argues that a physical taking did not occur here because the owls' nest was located on the property of an adjacent landowner. This is an irrelevant red herring because the subject regulation authorized the owls to occupy an entire protected *habitat*, which included 40 acres of Petitioners' timberland. Oregon Administrative Rule 629-665-0210 states in part:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (*Strix occidentalis caurina*), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> (a) A *70 acre area of suitable spotted owl habitat* encompassing the nest site, to be *maintained as suitable spotted owl habitat*;
>
> (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.
>
> (2) For the purpose of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an

activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3)(a) *For the purposes of this rule, suitable spotted owl habitat means and includes*:

(A) A stand of trees with moderate to high canopy closure (60 to 80%); *a multi-layered, multi-species canopy dominated by large overstory trees* (greater than 30 inches in diameter at breast height); *a high incidence of large trees with various deformities* (*e.g.*, large cavities, broken tops, and other evidence of decadence); *numerous large snags; large accumulations of fallen trees and other woody debris on the ground*; and *sufficient open space below the canopy for owls to fly*; or

(B) In the absence of habitat which exhibits all the characteristics listed above, *the available forested habitat which comes closest to approximating the listed conditions.*

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) of this section are not suitable habitat.

(Pet. App. G; 22a-23a (emphasis added).)

Pursuant to this regulation, in 1994 the Oregon Department of Forestry ("ODF") designated 40 acres of the Petitioners' timber as part of a protected 70 acre area "to be maintained as suitable spotted owl *habitat*." (*Id.* (emphasis added).) The regulation logically recognizes that spotted owls, like all birds, do not dwell solely within their nesting site. They must

roam and search for prey within a larger "habitat."[1] The regulation requires that all acreage within the habitat be protected for the public purpose of providing the owls with the timberland they need to occupy on a regular basis in order to survive and breed.[2] The State's contention that it authorized no physical occupation of Petitioners' land is simply wrong.

---

[1] The principal definition of "habitat" necessarily includes an area of physical occupation:

> 1. a. *Nat. Hist.* The locality in which a plant or animal naturally grows or lives; habitation. Sometimes applied to the *geographical area* over which it extends, or the special locality to which it is confined; sometimes restricted to the particular *station* or spot in which a specimen is found; but chiefly used to indicate the kind of locality, as the sea-shore, rocky cliffs, chalk hills, or the like.

The Oxford English Dictionary (2d ed. 1989) at 995 (emphasis in original).

The term "habitation" is principally defined as:

> 1. The action of dwelling in or inhabiting as a place of residence; *occupancy* by inhabitants.

Id. (emphasis added). *See also* 16 U.S.C.A. § 1532(5)(A) (defining "critical habitat" under the Endangered Species Act ("ESA") as including "the specific areas within the geographical area occupied by the species . . ."); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (upholding Secretary of the Interior's finding that habitat modification or degradation falls within meaning of "take" under ESA).

[2] The State's contention that the owls must permanently and exclusively occupy Petitioners' land before there can be a physical taking (*see* Response at 7-8) is contrary to this Court's physical takings jurisprudence. *See, e.g., U.S. v. Causby*, 328 U.S. 256 (1946) (temporary incursions of airspace over private land can give rise to a physical taking); *Tahoe-Sierra*, 122 S. Ct. at 1478-79 (every physical occupation authorized by government for public use is compensable, "even though that use is temporary.").

2. The State Restricted Petitioners' Right to Exclude the Owls from their Property.

Restriction on the right to exclude a government authorized intruder and forced acquiescence to the occupation is the hallmark of a physical taking. *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). The State erroneously argues that Petitioners were not barred from excluding the owls from their property because the nest was located on adjacent land.

First, as demonstrated above, the location of the nesting site itself was not the only place where the government authorized the owls to enjoy unrestricted, protected occupation. The entire "habitat" defines the area of authorized occupation. Ore. Admin. Rule 629-665-0210(1)(a), (3)(a)(A)-(B). So the State's attempt to argue that there can be no restriction on the right to exclude where there is no authorized intruder fails here because it is premised upon an incorrect view of the undisputed facts. The owls were authorized to occupy Petitioners' land.

Second, even though the nest was located elsewhere, Petitioners were prevented from doing anything *on their property* that might cause the owls to leave the nesting site, and it is undisputed that this included any harvesting of the subject timber. Ore. Admin. Rule 629-665-0210(1)(b) (Petitioners could engage in no "activities" that might "cause owls to flush from the nesting site"). The State's Response at pages 2-3 admits that Petitioners were denied the right to harvest because the State determined that doing so would violate the subject regulation.

Third, it is difficult to take seriously the State's rather bizarre suggestion that Petitioners were free to use any method other than deforestation to exclude the owls from their timber, such as erecting fences or installing sound devices.[3] (*See* Response at 2.) The entire point of the subject

---

[3] The State did not raise this argument below.

regulation is to make a full 70-acres of protected timberland available to the owls so they can seek prey and breed. The ODF denied Petitioners the right to harvest because it determined that eliminating Petitioners' 40 acre parcel of the habitat could cause the owls to leave the nesting site. There can be no doubt that the ODF would have construed the subject regulation to prohibit Petitioners from engaging in *any* activity designed to make their 40 acres of timber entirely unavailable to the owls. The regulation on its face prohibits such conduct if it is part of any "operation." Ore. Admin. Rule 629-665-0210(1). If Petitioners had attempted to protect their timber for eventual logging by excluding the owls through sound devices or any other means, the State would have prohibited them from doing so under the subject regulation and other pertinent statutes and regulations.[4]

3. The State Used Petitioners' Timber for a Public Purpose.

Contrary to the State's suggestion, Petitioners have not overstated the effect of the subject regulation, which resulted in a temporary physical taking for a public purpose.

---

[4] *See e.g.*, Ore. Admin. Rule 629-665-0020, which empowers the State Forester to take action to prohibit any operation or activity which threatens the fundamental goal of protecting wildlife resource sites, as set forth in Ore. Admin. Rule 629-665-0010:

> (1) The goal of resource site protection is to ensure that forest practices do not lead to resource site destruction, abandonment or reduced productivity.
>
> (2) A resource site shall receive protection when the State Forester determines:
>
> (a) It is an active resource site; and
>
> (b) Proposed forest practices conflict with the resource site.
>
> * * * *

Petitioners were prevented from harvesting their timber from 1994, when the ODF designated 40 acres of the Petitioners' timber as a part of a protected 70-acre spotted owl habitat, until 2001–two years after the physical takings claim before the Court was dismissed by the trial court. Under Oregon law, the Petitioners had to have the approval of the ODF in order to harvest their timber. Ore. Admin. Rule 629-665-0210(1). Petitioners submitted a written plan to harvest, which the ODF denied.

The ODF's ban on harvesting was permanent for as long as the owls chose to remain at the nesting site. Petitioners could not log after the nesting season. In the nature of a leasehold acquired by eminent domain, the State occupied and appropriated the only commercial value of the timberland for a definable period. The State plainly used the timber for a public purpose, *i.e.*, to provide a "suitable habitat" that could be "occupied by an adult pair of spotted owls, capable of breeding." Ore. Admin. Rule 629-665-0210 (1)-(2). This a *per se* physical taking.

Petitioners' ability to engage in non-commercially profitable activities on the property during the ban on harvesting is a fact relevant only within a regulatory taking analysis. Because this case involves a *per se* physical taking, however, the State is incorrect to suggest that Petitioners bear the burden of proving they could make no use of their property whatsoever, or that the government authorized a physical occupation which entirely excluded Petitioners from access to their land. (*See* Response at 7-8.) Like the plaintiff in *Loretto*, Petitioners have a right to compensation for the physical occupation of their property, notwithstanding any ability they may have had to control or use the land apart from logging.

B. Lower Court Decisions Are in Conflict on This Issue.

The State does not attempt to reconcile this Court's physical taking jurisprudence with the Oregon Court of Appeals' decision in *Boise Cascade Corporation v. Oregon Board of Forestry*, 991 P.2d. 563 (1999). The Oregon court's reasoning for rejecting a physical taking claim in *Boise*, based upon the State not having "control" over the owls, is contrary to this Court's physical taking jurisprudence stated in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Loretto*, 458 U.S. at 424; *Yee*, 503 U.S. at 522, and most recently *Tahoe-Sierra*, 122 S. Ct. at 1479 n. 19. *See also* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan. L. Rev. 305, 332-335 (1997).

Control over Petitioners' timber and not the owls is the issue. Petitioners could not use or dispose of their timber unless it could be harvested. No one was going to buy standing timber that could not be logged, nor was anyone going to purchase logs that could not be cut and delivered. Because the State used the timber to protect and preserve a spotted owl habitat, it exerted complete economic control over that property.

The State argues that because this Court denied certiorari in *Boise* it should also deny certiorari in this case. The fact that the Federal Circuit has recently followed the Oregon court's erroneous reasoning in *Boise Cascade v. U.S.*, 296 F. 3d. 1339 (Fed. Cir. 2002) is even more reason that the Court should grant certiorari in this case. The Federal Circuit *Boise* case is also now before the Court as it filed a petition for certiorari on November 27, 2002. The erroneous reasoning of the Oregon court should be overruled before any other court follows it.

The State's attempt to distinguish lower case law as outdated merely begs the question. Some of the cases consistent with Petitioners' position do pre-date *Loretto*. However, the State dismisses them as irrelevant based upon an incorrect assumption that *Loretto* supports subsequent decisions–such as that of the Oregon court here and the Federal Circuit's *Boise* decision–which hold that no physical taking analysis is applicable within the wildlife occupation context. That is the very conclusion that the Petition in this case challenges. *Loretto* supports the finding that a physical taking occured here.

C. Reference to Petitioners Regulatory Taking Claim Merely Accentuates the Need for Resolution of the Physical Taking Issue.

The State has included in its response as an appendix Petitioners' Second Amended Complaint in the pending case, which alleges various regulatory takings theories, that was refiled after they had sought, and were denied an incidental take permit by the U.S. Fish and Wildlife Service. This was done in an attempt to come within the "discretion" exception provided in Ore. Admin. Rule 629-665-0210(5) in order to satisfy the regulatory taking ripeness requirement. (Pet. App. G; 23a.) *See Boise*, 991 P.2d. at 572-73. The substantial barriers Petitioners face in trying to recover under a regulatory takings claim theory are shown by the State's Answer to that Complaint, reproduced as an Appendix to this Reply, which includes Seventeen Affirmative Defenses that can only lead to further appeals.

The Petitioners were entitled to have their claim tried on a physical taking theory in 1998, and not face the uncertainties of a trial in 2003 based upon a regulatory taking approach. The State's attempt in this case to push Petitioners into the regulatory taking context alone merely reinforces the granting of the Petition. It is important for this Court to grant review and provide lower courts with

guidance as to which branch of this Court's takings jurisprudence applies when the government has authorized the physical occupation of private land by wildlife and has imposed a servitude upon the land for the public purpose of preserving it as a wildlife habitat.

CONCLUSION

Petitioners respectfully urge the Court to grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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* Counsel of Record

Counsel for Petitioners

December 9, 2002

APPENDIX

IN THE CIRCUIT COURT OF THE STATE
OF OREGON FOR THE COUNTY OF LINN

Case No. 010333

MARSHA SEIBER and ALVIN SEIBER,
Plaintiffs,

v.

THE STATE OF OREGON, by and through its
DEPARTMENT OF FORESTRY,
Defendant.

ANSWER TO SECOND AMENDED COMPLAINT WITH AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

Defendant State of Oregon, by and through its Department of Forestry, answers Plaintiffs Alvin and Marsha Seibers' Second Amended Complaint as follows:

ANSWER

1.

In answer to paragraph 1 of the Second Amended Complaint:

The State admits upon belief that Marsha Seiber owns approximately 200 acres of property located in Linn County, Oregon (the "Seiber property"). The remaining allegations of the paragraph are denied.

2.

In answer to paragraph 2 of the Second Amended Complaint:

The State admits that OAR 629-24-809 was adopted by the State Board of Forestry in 1991. The State admits that OAR 629-24-809 was renumbered to OAR 629-665-0210 in 1996 without any changes in text. The texts of the rules cited are a matter of public record and their meaning is for the court to decide. The State denies that the Seibers' summary correctly interprets the rules in question and notes that portions of text and context have been omitted. Except as admitted, paragraph 2 is denied.

3.

In answer to paragraph 3 of the Second Amended Complaint:

The State admits that in 1994 approximately 40 acres of the Seiber property were identified and inventoried as part of a northern spotted owl "resource site". The State denies the remaining allegations of paragraph 3.

4.

In answer to paragraph 4 of the Second Amended Complaint:

The State admits that owl surveyors did not record responses from nesting owls known to be associated with the resource site in 1997. The State admits that the Seibers filed Notification No. 98-791-40082, giving notice of their intent to log certain parts of their property. In the notification, the Seibers indicated that they were willing to not conduct logging operations while spotted owls might be nesting in the area or until the young spotted owls had fledged. The State admits that Notification No. 98-791-40082 was not approved because the Seibers failed to explain how they would protect

the resource site. The State denies the remaining allegations of paragraph 4.

5.

In answer to paragraph 5 of the Second Amended Complaint:

The State admits that the Seibers appealed the denial of Notification No. 98-791-40082 and that the Board of Forestry entered a Final Order affirming the refusal to approve the notification on March 28, 1998. The reasons for the refusal to approve the notification as complying with the Oregon Forest Practices Act are listed in the order. The State denies the remaining allegations of paragraph 5.

6.

In answer to paragraph 6 of the Second Amended Complaint:

The State admits that the USFWS issued a Final Order on November 9, 2000 denying the Seibers an "incidental Take Permit" ("ITP") for the "Little Wiley" owls. The permit, if granted, would absolve the Seibers (and the State) from civil and criminal liability in the event that the contemplated timber harvest resulted in a "taking" of the Northern Spotted Owl. The remaining allegations of paragraph 6 are denied.

7.

In answer to paragraph 7 of the Second Amended Complaint:

The State admits that the State Forester informed the Seibers on August 3, 2001 that the nesting site had been declared abandoned. The State denies the remaining allegations in paragraph 7.

8.

In answer to paragraph 8 of the Second Amended Complaint:

The State responds as it responded in paragraphs 1 through 7 of this Answer.

9.

In answer to paragraph 9 of the Second Amended Complaint:

The State admits that the Seibers characterize the claim as a declaratory judgment that OAR 629-665-0210 effects a taking under the Fifth Amendment to the U.S. Constitution. The State denies that the rule results in taking either facially or as applied and denies that justiciable controversy is alleged under ORS 28.010 *et seq*. The State denies the remaining allegations in paragraph 9.

10.

In answer to paragraph 10 of the Second Amended Complaint:

The State responds as it responded in paragraphs 1 through 7 of this Answer.

11.

In answer to paragraph 11 of the Second Amended Complaint:

The State denies all of the allegations in paragraph 11.

12.

In answer to paragraph 12 of the Second Amended Complaint:

The State denies all of the allegations in paragraph 12.

13.

In answer to paragraph 13 of the Second Amended Complaint:

The State denies all of the allegations in paragraph 13.

14.

In answer to paragraph 14 of the Second Amended Complaint:

The State denies all of the allegations in paragraph 14.

15.

In answer to paragraph 15 of the Second Amended Complaint:

The State denies all of the allegations in paragraph 15.

16.

In answer to paragraph 16 of the Second Amended Complaint:

The State responds as it responded in paragraphs 1 through 7, 11, 13 and 14 of this Answer.

17.

In answer to paragraph 17 of the Second Amended Complaint:

The State denies the allegations in paragraph 17.

18.

In answer to paragraph 18 of the Second Amended Complaint:

The State responds as it responded in paragraphs 1 through 7, 11 and 13 of this Answer.

19.

In answer to paragraph 19 of the Second Amended Complaint:

The State admits that the Oregon Legislature enacted several statues involving threatened or endangered wildlife species. The State denies that the Seibers have correctly quoted ORS 496.192(1). They have improperly omitted portions altering text and contest.

20.

In answer to paragraph 20 of the Second Amended Complaint:

The State admits that ORS 527.630(1) was partially amended in 1987. The State denies that the Seibers have correctly quoted a part of ORS 527.630(1) in that they have omitted portions altering text and context.

21.

In answer to paragraph 21 of the Second Amended Complaint:

The State denies the allegations in paragraph 21.

22.

In answer to paragraph 22 of the Second Amended Complaint:

Paragraph 22 of the Second Amended Complaint is argument and is both equivocal and misleading. The term "critical habitat" is a term of art. The State admits that the United States designated critical habitat on federal lands. The State denies that either the Seibers or the State are thereby absolved from compliance with civil or criminal provisions of the Federal Endangered Species Act. Paragraph 22 is denied, except as stated herein.

23.

In answer to paragraph 23 of the Second Amended Complaint:

The State denies all the allegations in paragraph 23.

24.

In answer to paragraph 24 of the Second Amended Complaint:

The State responds as it responded in paragraphs 1 through 7, 13, 19, 21 and 22 of this Answer.

25.

In answer to paragraph 25 of the Second Amended Complaint:

The State denies all the allegations in paragraph 25.

AFFIRMATIVE DEFENSES

For a FIRST AFFIRMATIVE DEFENSE, the State alleges: (Another Action Pending Between the Same Parties for the Same Cause- ORCP 21A(3))

26.

The State realleges its answer herein.

27.

In 1998, the Seibers filed *Marcia Seiber, Alvin Seiber, and the Oregon Small Woodlands Association v. State of Oregon, by and through the Oregon State Board of Forestry* in Linn County Circuit Court Case No. 980649. The Second Amended Complaint in that case is nearly identical to the Second Amended Complaint in the instant matter.

28.

By Judgment dated December 8, 1999, the Circuit Court dismissed all of OSWA's claims with prejudice and allowed

the State's motion for summary judgment against the Seibers on all claims. That Judgment was affirmed without opinion by the Oregon Court of Appeals, CA #108914, and the Oregon Supreme Court denied review. Certiorari is currently pending before the United States Supreme Court.

29.

ORCP 21A(3) provides that a matter may be dismissed when there is another action pending between the same parties for the same cause.

30.

In the instant case Plaintiffs seek a judgment predicated upon the order of the board on that case dated March 27, 1998 and not upon its subsequent order in this application dated January 17, 2001.

For a SECOND AFFIRMATIVE DEFENSE,
the State alleges:
(Subject Matter Jurisdiction Exclusively in Court of Appeals for Claim One Under ORS 183.400(2))

31.

The State realleges its answer above.

32.

The validity of OAR 629-665-0210 was a subject of a contested case hearing between the parties on or about March 23, 1998.

33.

The validity of any applicable rule may be determined by a court upon review of an order pursuant to ORS 183.480. ORS 183.480(2). A party to a contested case in which the agency determines the validity of a rule may obtain judicial review of the validity of the rule only as provided for an order in a contested case. ORS 183.400(1).

34.

The Court of Appeals has exclusive jurisdiction to review the Board of Forestry's final order. ORS 183.482(1). Therefore, the Court of Appeals has exclusive jurisdiction to review the validity of the rule on a challenge brought by the Seibers.

35.

The Circuit Court lacks jurisdiction to determine the validity of OAR 629-665-0210 in this case.

For a THIRD AFFIRMATIVE DEFENSE,
the State alleges:
(Subject Matter Jurisdiction in Court of Appeals
Under ORS 183.400(1))

36.

The State realleges its answer above.

37.

The validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases. ORS 183.400(1).

38.

In Claim One of the Second Amended Complaint, the Seibers seek declaratory relief regarding the validity of OAR 629-665-0210.

39.

The Uniform Declaratory Judgment Act ("UDJA"), ORS 28.010 *et seq.*, does not confer jurisdiction on the Circuit Court for a challenge to the validity of any administrative rule.

FOURTH AFFIRMATIVE DEFENSE
(Immunity)

40.

The State of Oregon is immune from suit unless the Oregon Legislature passes a general law waiving the State's sovereign immunity from suit. Oregon Constitution, Art. IV, § 24. UDJA is not a general law that waives the State's immunity or allows the State to be sued by a person seeking declaratory relief. Therefore, UDJA does not provide an independent basis for subject matter jurisdiction in the Circuit Court.

41.

The Circuit Court lacks jurisdiction to review Claim One of the Complaint.

For a FIFTH AFFIRMATIVE DEFENSE,
the State alleges:
(Second Exercise of Concurrent Jurisdiction
for Second Claim and Third Claim, Count One)

42.

The State realleges its answer and paragraphs 31 to 41 above.

43.

The Board of Forestry and the Circuit Court have concurrent jurisdiction to determine the issue of whether a refusal by the State to approve a written plan effects a taking of a claimant's property.

44.

On March 28, 1998 and on January 17, 2001, the Board of Forestry exercised its jurisdiction and determined that the refusal to approve the Seibers' written plan does not effect a taking of their property.

45.

The Circuit Court does not have jurisdiction to determine the issue of whether a refusal by the State to approve a written plan effects a taking of the Seibers' property. Judicial Review of that decision rests with the Oregon Court of Appeals following a contested case hearing.

For a SIXTH AFFIRMATIVE DEFENSE, the State alleges: (Issue Preclusion for Second Claim, Second Claim and Third Claim, Count One)

46.

The issue (including all sub-issues) of whether the refusal to approve the Seibers written plan effects a taking of their property in Claims Two and Three in the Second Amended Complaint is identical to an issue (including all sub-issues) in the March 23, 1998 contested case before the Board of Forestry.

47.

The issue was actually litigated and was essential to the final decision on the merits in the Seiber contested case before the Board of Forestry on March 23, 1998.

48.

The Seibers had a full and fair opportunity to be heard on the issue in the March 23, 1998 contested case before the Board of Forestry.

49.

The Seibers were the exact parties that petitioned for the contested case before the Board of Forestry on March 23, 1998.

50.

The March 23, 1998 contested case before the Board of Forestry is the type of administrative proceeding to which the Circuit Court will give preclusive effect. The Board of Forestry maintains procedures that are sufficiently formal and comprehensive. The contested case before the Board of Forestry is trustworthy. Application of issue preclusion would facilitate prompt, orderly and fair problem resolution. The Seiber contested case before the Board provides the same quality of proceedings and opportunity to litigate that is presented by the Circuit Court.

51.

The March 28, 1998 Final Order of the Board of Forestry determined the issue (including all sub-issues) and concluded that the refusal to approve the Seiber's written plan does not effect a taking of their property.

52.

The Circuit Court should give preclusive effect to the Board of Forestry's determination of the issue (including all sub-issues).

For an SEVENTH AFFIRMATIVE DEFENSE,
the State alleges:
(Issue Preclusion for Second Claim)

53.

The State realleges 46 to 52 above.

54.

The issue (including all sub-issues) of whether the Board of Forestry exceeded its authority in adopting OAR 629-665-0210 in Claim One in the Second Amended Complaint is identical to an issue (including all sub-issues) in the March 23, 1998 contested case before the Board of Forestry.

55.

The issue was actually litigated and was essential to a final decision on the merits in the contested case before the Board of Forestry on March 23, 1998.

56.

The Seibers had a full and fair opportunity to be heard on the issue in the March 23, 1998 contested case before the Board of Forestry.

57.

The Seibers were the exact parties that petitioned for the March 23, 1998 contested case before the Board of Forestry.

58.

The contested case before the Board of Forestry is the type of administrative proceeding to which the Circuit Court will give preclusive effect. The Board of Forestry maintains procedures that are sufficiently formal and comprehensive. The Seiber contested case before the Board of Forestry was trustworthy. Application of issue preclusion would facilitate prompt, orderly and fair problem resolution. The Seiber contested case before the Board provides the same quality of proceedings and opportunity to litigate that is presented by the Circuit Court.

59.

The March 28, 1998 Final Order of the Board of Forestry in the March 23, 1998 contested case determined the issue (including all sub-issues) and concluded that the Board of Forestry did not exceed its authority in adopting OAR 629-665-0210.

60.

The Circuit Court should give preclusive effect to the Board of Forestry's determination of the issue (including all sub-issues).

For an EIGHTH AFFIRMATIVE DEFENSE,
the State alleges:
(Claim Preclusion for Second Claim)

61.

The State realleges paragraphs 46 through 60.

62.

The Seibers may not raise the issue (or any sub-issues) of whether the Board of Forestry exceeded its authority in adopting OAR 629-665-0210 in this proceeding since they could have raised the issue (and all sub-issues) in the March 23, 1998 or the later proceeding contested case before the Board of Forestry.

For a NINTH AFFIRMATIVE DEFENSE,
the State alleges:
(Claim Preclusion for Second Claim and Third Claim, Count One)

63.

The State realleges paragraphs 46 through 60.

64.

The Seibers could have raised the issue (and all sub-issues) of whether the Board of Forestry's refusal to approve their written plan effects a taking their property in the contested case before the Board of Forestry and is thus precluded from raising the issue in this proceeding.

For a TENTH AFFIRMATIVE DEFENSE,
the State alleges:
(Ripeness for Claims Two and Three)

65.

The State realleges paragraphs 46 through 60.

66.

The Seibers have not yet obtained a final decision (as opposed to a final order) regarding the application of OAR 629-665-0210 to their property. The Seibers have not yet obtained a final order regarding the application of OAR 629-665-0210 to property other than the Seiber property. The Seibers have failed to seek in good faith the waivers, modifications and exceptions available from the State.

67.

The State Forester may allow an operator, landowner, or timber owner to waive or modify forest practice rules for various reasons if he makes certain determinations based upon a request by the operator, landowner or timber owner. The Seibers have not requested such waivers or modifications.

68.

Claims Two and Three of the Complaint are not ripe for judicial resolution.

For a ELEVENTH AFFIRMATIVE DEFENSE,
the State alleges:
(Waiver for Claims Two and Three)

69.

The State realleges its answer.

70.

The Seibers notified the State of their intent to harvest timber from portions of their land in 1994 and 1996.

71.

The resource site for the Little Wiley pair of northern spotted owls was identified and inventoried by the State in 1994. The resource site was identified in the State's final order receiving the Seibers' application to log in 1994. The identification was a finding of the State Forester under ORS 527.700. The Seibers could have appealed the identification and inventory of the resource site on or before April 1, 1994.

72.

The Seibers' failure to appeal the finding identifying the resource site for the Little Wiley pair constitutes consent to, and a waiver of any claims arising from, the finding and the application of OAR 629-665-0210 to the resource site.

For an TWELFTH AFFIRMATIVE DEFENSE,
The State alleges:
(Failure to State a Claim for Claim One)

73.

The State realleges paragraphs 1 through 72.

74.

The Seibers fail to allege that the State lacks authority to adopt a rule that effects a taking in some circumstances. The Seibers fail to allege that the State lacks authority to apply a rule in a manner that effects a taking.

75.

The Seibers fail to allege facts sufficient to demonstrate that the Seibers are entitled to declaratory relief.

76.

The Seibers fails to allege facts demonstrating that the Circuit Court has subject matter jurisdiction to determine the validity of OAR 629-665-0210.

For a THIRTEENTH AFFIRMATIVE DEFENSE,
the State alleges:
(Failure to State a Claim for Claims Two and Three)

77.

The State realleges paragraphs 1 through 41.

78.

The Seibers fail to allege facts demonstrating that the State has taken any of their property.

79.

The Seibers fail to allege the ultimate facts sufficient to constitute a claim for relief for Claims Two and Three.

For a FOURTEENTH AFFIRMATIVE DEFENSE,
the State alleges:
(Failure to State a Claim for Attorneys Fees)

80.

No attorney fees shall be awarded unless a right to recover such fee is alleged as provided in ORCP 66 C. A party seeking attorney fees shall allege the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. ORCP 68 C.

81.

The Seibers failed to allege the facts, statute, or rule that provides a basis for their request for attorney's fees.

82.

The Seibers fail to allege facts sufficient to demonstrate that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.

FIFTEENTH AFFIRMATIVE DEFENSE
(Illegality)

83.

The State realleges its answer.

84.

On November 9, 2000 the United States acting by and through its Department of Interior, Fish and Wildlife Service denied Plaintiffs an incidental take permit to log the area in question on the basis that the Little Wiley spotted owl site was "active."

85.

Habitat disturbance in and around an "active" owl site may result in a "take" of the owls that is reasonably foreseeable.

86.

Approving a notification that results in "taking" an owl could expose the State to civil and criminal liability under the Federal Endangered Species Act.

87.

Plaintiffs' failure to secure an ITP or a determination of "no jeopardy" placed the State and its officials at risk if the State approved the notification.

SIXTEENTH AFFIRMATIVE DEFENSE
(Claim Preclusion)

88.

All claims concerning the March 1998 refusal to approve the notification no. 98-791-40082 were or could have been litigated in Case No. 980649 decided adversely to the Seibers. The Seibers are precluded from relitigating matters that were or could have been decided in that case.

SEVENTEENTH AFFIRMATIVE DEFENSE
(Estoppel)

89.

In hearings before the State Administrative panels and before the courts the Seibers took the position that they did not require an ITP and that they did not pursue one prior to applying for notification no. 98-791-40082.

90.

The State did not approve the notification based in part upon a record in which the Seibers refused to seek an ITP. The Seibers were represented by counsel in those proceedings and the State relied upon counsel's representation of the Seibers position.

91.

The Seibers should not now be permitted to argue that the agency decision in refusing approval was wrong in 1998 and that a claim based upon the 1998 record, which they constructed is in error, when the Seibers' actions and representations removed the issue of whether it was then possible to get an ITP from consideration.

For a FURTHER SEPARATE ANSWER AND COUNTERCLAIM, The State alleges:

ALTERNATIVE COUNTERCLAIM
(Title to Realty)

92.

The State incorporates by reference all matters admitted in paragraphs 1 through 91.

92.

Should the Seibers prevail on the issue of whether the State has taken any of their property, and if they are awarded compensation, then the State should be awarded an interest in the property commensurate with the compensation paid and all rights and opportunities necessary and customary for possession and use of the property. The award is necessary to prevent unjust enrichment of the Seibers.

WHEREFORE, the State prays for the following relief:

1. Judgment in the State's favor;

2. An award of costs and disbursements;

3. Should the Seibers prevail on the issue of whether the State has taken their property, then allow the State to further consider the application of OAR 629-665-0210 to the Seibers' property;

4. Should the Seibers prevail on the issue of whether the State has taken their property and be awarded compensation, then award the State an interest in the property commensurate with the compensation paid and all rights and opportunities necessary and customary for possession and use of the property; and

5. Any further relief that the Court determines is appropriate.

DATED this 2nd day of December, 2002.

Respectfully submitted,

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